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80-1864

IN THE

Supreme Court of the United States

October Term, 1980

No. _____

NEW ENGLAND PETROLEUM CORPORATION,

Respondent,

-against-

JAMES H. TULLY., Commissioner of Taxation and Finance of the State of New York, and ROBERT ABRAMS, Attorney General, State of New York,

Petitioners.

MOBIL OIL CORPORATION, ATLANTIC RICHFIELD COMPANY, GULF OIL CORPORATION, UNITED REFINING COMPANY, INC., CHEVRON, U.S.A., INC., AMOCO OIL COMPANY, TEXACO OIL., and EXXON CORPORATION,

Respondents,

-against-

JAMES H. TULLY, JR., THOMAS H. LYNCH, and FRANCIS KOENIG, Constituting the New York State Tax Commission; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LaROCCA, Commissioner of the New York State Energy Office,

Petitioners.

AMERADA HESS CORPORATION,

Respondent,

-against-

JAMES H. TULLY, JR., THOMAS H. LYNCH, AND FRANCIS KOENIG, Constituting the NEW YORK STATE TAX COMMISSION; ROBERT ABRAMS, Attorney General of the State of New York; and JAMES L. LaROCCA, Commissioner of the New York State Energy Office,

Petitioners.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

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Question Presented

Does not the Tax Injunction Act, 28 USC § 1341, divest the Federal courts of jurisdiction to enjoin enforcement of a provision of a New York State tax statute on who shall bear the tax, when that injunction would necessarily prevent collection of the tax itself?

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Petitioners.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit.

The petitioners respectfully pray that a writ of certiorari issue to review that portion of the judgment of the United States Court of Appeals for the Second Circuit entered in this proceeding on

January 28, 1981 which affirmed the District Court's denial of petitioners' motion to dismiss for lack of jurisdiction.

Opinions Below

The memorandum-decision of the District Court for the Northern District of New York (NEAL P. McCURN, D.J.), dated September 19, 1980, which, *inter alia,* denied petitioners' motion to dismiss for lack of Federal jurisdiction, pursuant to 28 USC § 1341, is reported at 499 F Supp 888 and is set forth as Appendix "A".

The opinion for affirmance of the Court of Appeals, dated January 28, 1981 which affirmed the District Court's denial of Appendix "B".

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on January 28, 1981, affirming the order of the United States District Court for the Northern District dated September 4, 1980. The jurisdiction of this Court is invoked under 28 USC § 1254(1).

Statutes Involved

28 USC § 1341, New York Tax Law, § 182 and chapter 272 of the Laws of New York of 1980 are set forth in pertinent part in Appendix "C".

Statement of the Case

In June, 1980, New York Governor Hugh Carey signed into law two bills (chs 271 and 272 of the Laws of New York of 1980), which created New York Tax Law, § 182, establishing a 2% tax on the gross income of oil companies allocable to sources in New York. The express purpose of this law was to generate revenue to aid New York's public transportation system (ch 272 of the Laws of New York of 1980, § 1).

In order to insure that the burden of this tax would be borne by the oil companies, themselves, and not the already overburdened consuming public, the Legislature provided in subdivision 12(a) of New York Tax Law § 182 (the "anti-pass through provision") that the tax imposed "shall be a liability of the oil company...and shall not be included, directly or indirectly, in the sales price of its products sold in this state." Because this provision was an essential element of the tax policy underlying section 182, the Legislature expressly made the continued vitality of the tax, itself, dependent upon the validity of that provision. Thus, section 5 of chapter 272 of the Laws of New York of 1980 provides that if enforcement of the anti-pass through provision is enjoined, the tax itself will cease to have force and effect.

Thereafter, respondents, ten oil companies, instituted this action in the District Court for the Northern District of New York, seeking (1) a declaration that the anti-pass through provision is unconstitutional under the Supremacy, Commerce and Due Process Clauses of the United States Constitution and (2) a permanent injunction against enforcement of that provision.

The respondents subsequently moved for summary judgment upon their claim that the anti-pass through provision is preempted by the Emergency Petroleum Allocation Act (15 USC § 741, *et seq.*) and its regulations and is therefore void under the Supremacy Clause.

The petitioners, in turn, moved to dismiss the action for lack of Federal jurisdiction, relying on the Tax Injunction Act (28 USC § 1341), which precludes Federal courts from enjoining "the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

Memorandum and Decision of the District Court

The District Court denied petitioners' motion to dismiss, holding section 1341 inapplicable to this action. The Court recognized that an injunction against enforcement of the anti-pass through

provision would terminate the entire tax imposed by New York Tax Law § 182, but nevertheless held this action beyond the jurisdictional prohibition of the Tax Injunction Act. This holding was premised upon the rationale that the anti-pas through provision was a "price control measure, rather than a rule of tax incidence" (A7).

Proceeding to the merits, the Courts granted respondents' motion for summary judgment, declaring the anti-pass through provision in violation of the Supremacy Clause and enjoining its enforcment.*

Opinion of the Court of Appeals

The Court of Appeals affirmed the denial of petitioners' motion to dismiss, agreeing with the District Court's determination that the anti-pass through provision was a price control measure, enacted under the State's police power, rather than its taxing power. Therefore, the Court concluded, a "constitutional attack under the Supremacy Clause on that aspect of the law is not within Section 1341" (A29). The Court found this result unaffected by the statutory linkage between the validity of the anti-pass through provision and the continued existence of the oil franchise tax under New York Tax Law § 182, reasoning that this linkage was "the calculated decision of the legislature" (A28).

The Court also dismissed the petitioners' appeal from the District Court's grant of summary judgment, holding that the preemption issue raised in this litigation falls within the exclusive appellate jurisdiction of the Temporary Emergency Court of Appeals, pursuant to section 5 of the Emergency Petroleum Allocation Act (15 USC § 754[a][i]). Petitioners' appeal from the grant of summary judgment is presently pending in that Court.**

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*This judgment has been stayed from the date of its entry to the present time.

**Should defendants prevail in establishing that there is no preemption, extensive litigation is further anticipated on plaintiffs' claims based on the commerce clause and due process. Meanwhile, defendants maintain that the motion to dismiss for lack of jurisdiction was erroneously decided.

REASONS FOR GRANTING THE WRIT

The decision below resolved a significant and recurrent issue concerning the scope and purpose of the Federal Tax Injunction Act (28 USC § 1341) in a manner contrary to established Federal authority.

The issue of threshold jurisdiction involved in petitioners' motion to dismiss is of extreme significance, likely to recur with troublesome frequency within contexts similar to the instant matter. As recognized by the New York State Legislature, record oil profits caused by international market conditions make the oil industry an appropriate source of the additional State tax revenue increasingly necessary to alleviate budget problems resulting from ever-rising costs (ch 272 of the Laws of New York of 1980, § 1). Any state statute aimed at the oil industry, however, must address both the effect such taxes could have upon already intolerable oil prices and the resultant impact an increase in these prices would have upon a state's economy. It is clear, therefore, that considerable legislative ingenuity is required to devise tax statutes which will tap this source of revenue without contributing to the country's debilitating inflationary cycle. The decision below will have a chilling effect on the exercise of such ingenuity, casting the spectre of federal injunctive intervention upon all state tax policy decisions addressed to these issues. Indeed, the availability of such a federal remedy could pose a grave threat to the operation of state fiscal systems, since, as recognized by the Court of Appeals (A24), it has been estimated that section 182's oil tax would raise 235 million dollars annually.

The decision below conflicts with established equitable principles of Federal/State comity intended to avoid such federal intervention in state tax policy matters. This Court has often noted that federal district courts are "under an equitable duty to refrain from interfering with a State's collection of its revenue except in cases where an asserted federal right might otherwise be lost" (*Tully v Griffin, Inc.*, 429 US 68, 73 [1976]). Prior to the enactment of section 1341, a unanimous Court in *Matthews v Rodgers*, 284 US 521, 525-526 (1932), discussed the sensitive nature of the use of

Federal injunctions to enjoin the assessment or collection of a state tax:

> "The scrupulous regard for the rightful independence of state governments which should at all times actuate the federal courts, and a proper reluctance to interfere by injunction with their fiscal operations, require that such relief should be denied in every case where the asserted federal right may be preserved without it. Whenever the question has been presented, this Court has uniformly held that the mere illegality or unconstitutionality of a state or municipal tax is not in itself a ground for equitable relief in the courts of the United States."

This vitally important principle is embodied in the express mandate of the Tax Injunction Act (28 USC § 1341) that no Federal injunction may issue to restrain the "assessment, levy or collection" of state taxes. Four decades of Supreme Court pronouncements reveal that "the statute has its roots in equity practice, in principles of federalism, and in recognition of the imperative need of a State to administer its own fiscal operations" (*Tully v Griffin, Inc.*, 429 US 68, 73[1976], *supra*, citing *Moe v Salish & Kootenai Tribes*, 425 US 463 [1976]; *Hillsborough v Cromwell*, 326 US 620, 622-23 [1946]; *Great Lakes Dredge & Dock Co. v Huffman*, 319 US 293 [1943]; *Matthews v Rodgers, supra*). In an age of heightened sensitivity toward the role of the states in the federal system, this Court's decisions continue to affirm that "federal courts will not entertain anticipatory adjudication which interferes with state and local tax administration if there is an adequate state remedy" (*Robinson Protective Alarm Co. v Philadelphia*, 581 F2d 371, 376 [3d Cir, 1978], citing *Steffel v Thompson*, 415 US 452, 472 [1974]; *Lynch v Household Finance Corp.*, 405 US 538, 542 n 6 [1972]; *Perez v Ledesma*, 401 US 82, 126-28 & n 17 [BRENNAN, J., concurring in part and dissenting in part]).

Such interference with New York State's tax administration is manifest in this case. Despite any incidential price control effect it might have, the anti-pass through provision at issue here is an

integral aspect of the tax policy sought to be accomplished by section 182 (see ch 272 of the Laws of New York of 1980, § 1). The purpose of the anti-pass through provision is not to regulate oil price levels at all, but rather to prevent the tax on oil companies from fueling inflation, by insuring that its ultimate burden is not passed on to the consumers.

Furthermore, the allocation of a tax's economic burden is clearly an element of the State's taxing power, not its police power. Taxing authorities have broad power to determine who shall bear the price of government (*First Agricultural National Bank v Tax Commission,* 392 US 339, 347-48 [1968]). The exercise of this power is especially evident in the area of sales taxes, for example, whose economic impact is often directed specifically by the taxing statutes (see, e.g., NJSA, §§40.48-8.7[b], 8.20[b]; Ohio Rev Code Ann, § 5739.29; NY Tax Law § 1133[d]). The willingness of the courts below to interfere with the exercise of New York's taxing power is directly contrary to the express provisions of section 1341 and the equitable principles upon which that section is founded.

Moreover, since the Legislature considered the anti-pass through provision such an essential element of the tax statute, it expressly made the continued existence of the tax, itself, dependent upon the validity of that provision (ch 272 of the Laws of New York of 1980, § 5).* It cannot be gainsaid, therefore, that if respondents are successful in their attack upon the anti-pass through provision, the tax imposed by New York Tax Law, § 182 will cease to exist.

Because an injunction against enforcement of that provision would thus, as a matter of law, "restrain the assessment, levy or

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*That section provides, in pertinent part:

"[i]f the provisions of [the anti-pass through section] is [sic]:

(i) adjudged by any court of competent jurisdiction to be invalid and after exhaustion of all further judicial review;

* * * *

all of the provisions of this act shall cease to be in force and effect [ten days thereafter]."

collection" of the section 182 oil tax, this case falls squarely within the provisions of the Tax Injunction Act. In holding to the contrary, the Court below gave that Act a narrow, begrudging interpretation at odds with the broad construction accorded by Federal courts in other circuits (see, e.g., *Helmsley v Detroit,* 320 F2d 476 (6th Cir, 1963); *Czajkowski v Illinois,* 460 F Supp 1265, 1271-74 (ND Ill, 1977), affd 588 F2d 839 (7th Cir, 1978); *Mandel v Hutchinson,* 336 F Supp 772, 779 (CD Cal, 1971), affd 494 F2d 364 (9th Cir, 1974).

One court has, in fact, noted that Federal courts have applied the jurisdictional bar of section 1341, "virtually without exception in favor of the State taxing authorities." *Mandel v Hutchinson, supra,* p 778. In *Mandel,* the plaintiff sought to enjoin enforcement of a provision in the California Constitution which limited certain property tax exemptions to veterans who were California residents at the time of entering into military service. The Court granted the defendants' motion to dismiss for lack of jurisdiction despite plaintiff's argument that he was seeking "only to enjoin the enforcement of the [Constitution's] residency requirement," rather than " to restrain the assessment, levy or collection" of any tax within the meaning of section 1341 (*supra,* p 779). The Court found dismissal mandated by section 1341 because "there is a *direct* relationship between the enforcement of the residency requirement and the amount of taxes collected. If the residency requirement falls, the number of allowable exemptions increases and the amount of tax revenue decreases." (Emphasis added.)

Just as the plaintiff in *Mandel* argued that he was seeking only to enjoin the enforcement of the residency requirement and not the tax itself, the Court below reasoned that the District Court's injunction restrained simply the anti-pass through provision of the tax. Federal authority establishes, however, that the Tax Injunction Act nevertheless requires dismissal since "there is a direct relationship" between the anti-pass through provision and "the amount of taxes collected."

The broad interpretation Federal courts have given section 1341's scope is aptly illustrated by *Czajkowski v Illinois,* 460 F Supp 1265 (ND Ill, 1977), affd 588 F2d 839 (7th Cir, 1978), *supra.* In that

case, plaintiffs sought to enjoin the enforcement of two provisions of Illinois' "regulatory scheme" taxing the distribution, sale and use of cigarettes. These provisions authorized state revenue agents who observe Illinois residents purchasing cigarettes at discount prices in Indiana stores to follow those residents into Illinois, and then to conduct warrantless searches of their automobilies. The defendants moved to dismiss pursuant to 28 USC § 1341. The Court, noting that "[i]t is arguable that plaintiffs are only seeking to enjoin the state from using unconstitutional methods and procedures to collect the taxes, rather than the collection of taxes itself", nonetheless granted the defendant's motion to dismiss since "in order to grant plaintiffs the relief they request, we would in effect be enjoining the collection of cigarette taxes" (*supra,* p 1272). As the Court wrote, *supra:*

> "Section 1341 cannot be avoided by attacks on the administration and implementation of the taxing scheme rather than on the validity of the tax itself ..."

The Court below ignored the broad interpretation given section 1341 by other Federal courts and affirmed the granting of an injunction which would inevitably disrupt New York's taxing process. Accordingly, the decision of the Court below raises serious questions in a sensitive area of Federal/State comity. It may, in fact, signal a new-found willingness by the Federal courts to intrude into areas involving the States' tax power by carving unwarranted exceptions to section 1341's broad prohibition.

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Dated: Albany, New York
April 22, 1981

Respectfully submitted,

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APPENDIX

APPENDIX A

MOBIL OIL CORP. v. TULLY

Cite as 499 F.Supp. 888 (1980)
499 FEDERAL SUPPLEMENT

MOBIL OIL CORPORATION, Atlantic Richfield Company, United Refining Company, Inc. and Gulf Oil Company, Plaintiffs,

v.

James H. TULLY, Jr., Thomas H. Lynch, and Francis Koenig, Constituting the New York State Tax Commission; Robert Abrams, Attorney General of the State of New York; and James L. LaRocca, Commissioner of the New York State Energy Office, Defendants.

NEW ENGLAND PETROLEUM CORPORATION, Plaintiff,

v.

James H. TULLY, Jr., Commissioner of Taxation and Finance of the State of New York, and Robert Abrams, Attorney General, State of New York, Defendants.

AMERADA HESS CORPORATION, Plaintiff,

v.

James H. TULLY, Jr., Thomas H. Lynch, and Francis Koenig, Constituting the New York State Tax Commission; Robert Abrams, Attorney General of the State of New York; and James L. LaRocca, Commissioner of the New York State Energy Office, Defendants.

Nos. 80-CV-543, 80-CV-544, 80-CV-570.

United States District Court,
N. D. New York.
Sept. 19, 1980.

Oil companies brought action seeking declaratory and injunctive relief with respect to antipass–through provision of New York statute imposing gross receipts tax on oil companies. On plaintiffs' motion for summary judgment and defendants' motion to dismiss, the District Court, McCurn, J., held that: (1) action was not barred by Tax Injunction Act; (2) New York tax was a franchise tax permitted to be passed through under federal regulation; and (3) antipass–through provision of New York law was preempted by federal regulation.

Order accordingly.

1. Courts ⇐508(6)

Tax Injunction Act was intended to eliminate discrimination between citizens of a state who are confined to state court in challenging illegal tax assessments and foreign corporations who are able to take advantage of diversity jurisdiction in federal court and was also intended to prevent foreign corporations from paralyzing state fiscal operations by refusing to pay state taxes and then commencing long and expensive litigation in federal court. 28 U.S.C.A. § 1341.

2. Courts ⇐508(6)

Tax Injunction Act applies equally to actions for declaratory or injunctive relief. 28 U.S.C.A. § 1341.

3. Courts ⇐508(6)

Action seeking declaration that provision of New York law prohibiting the pass–through of the state's two percent gross receipts tax on certain oil companies was not an attack on the validity of the tax or the statutorily prescribed administrative procedures for assessing, levying or collec-

ting the tax and thus was not barred by the Tax Injunction Act, even though the New York statute contained a provision terminating the tax in the event that the anti-pass-through provision were invalidated. 28 U.S.C.A. § 1341; N.Y. Tax Law § 182, subd. 12(a); N.Y.Laws 1980, c. 271, § 12 as amended.

4. Courts ⇐508(6)

For purposes of determining applicability of the Tax Injunction Act, the federal definition of tax is to be employed. 28 U.S.C.A. § 1341.

5. States ⇐4.11

State statutes can be preempted by federal regulations properly promulgated under a federal statute when there is a conflict between state and federal regulation. U.S.C.A.Const. Art. 6, cl. 2.

6. States ⇐4.13

When Congress has chosen to completely occupy the field to the exclusion of the states, state may not regulate within the field even when the regulation is in harmony with the federal scheme; if state law conflicts with valid federal statute, the state is preempted even though Congress has not completely foreclosed state legislation in a particular area. U.S.C.A.Const. Art. 6, cl. 2.

7. States ⇐4.10

Existence of pervasive and complex regulations under federal law does not, in every case, demonstrate a congressional intent to completely occupy a particular field so as to preempt any state regulation in that field.

8. States ⇐4.10

Preemption conflicts may be found,

even absent an actual conflict between state and federal law, where it is clear that Congress has addressed the issue and decided that the particular field should remain unregulated.

9. States ⇐4.13

State law cannot escape invalidation on preemption grounds merely because its purpose promotes a valid state interest if its effect frustrates the full effectiveness of federal law. U.S.C.A.Const. Art. 6, cl. 2.

10. Federal Civil Procedure ⇐2465

Summary judgment is not necessarily inappropriate simply because the legal issues are complex. Fed.Rules Civ.Proc. Rule 56, 28 U.S.C.A.

11. War and National Emergency ⇐124

Even if an oil refiner has not applied cost increases equally among all classes of purchasers, the refiner will be deemed to have done so under regulations adopted pursuant to the Emergency Petroleum Allocation Act and will not have the deemed amounts available for future increases. Emergency Petroleum Allocation Act of 1973, § 4(a), 15 U.S.C.A. § 753(a).

12. States ⇐4.10

Existence of a specific preemption provision in federal legislation does not preclude application of the general preemption principles.

13. Courts ⇐89

Letter written by acting general counsel for Department of Energy opining that a state's antipass–through provision of a gross receipts tax imposed on certain oil companies did not conflict with the Emergency Petroleum Allocation Act and its reg-

ulations was not decisive of the issue. Emergency Petroleum Allocation Act of 1973, § 6(b), 15 U.S.C.A. § 755(b).

14. War and National Emergency ⇐124

New York's gross receipts tax imposed on oil company receipts except those received for the sale of fuel oil for residential purposes was a state franchise tax falling within that group of taxes which could, under regulations adopted pursuant to the Emergency Petroleum Allocation Act, be passed through to the consumer. Tax Law N.Y. § 182; Emergency Petroleum Allocation Act of 1973, § 4(a), 15 U.S.C.A. § 753(a).

15. War and National Emergency ⇐124

In determining whether antipass-through provision of New York's gross receipts tax imposed on oil companies was preempted by federal regulation, court was required to look not only at the particular regulation but at the objectives which the Department of Energy sought to further by its promulgation. Emergency Petroleum Allocation Act of 1973, § 4(a), 15 U.S.C.A. § 753(a).

16. States ⇐4.10

Antipass-through provision of New York's gross receipts tax imposed on oil companies was preempted by federal regulation in the field both with respect to oil products covered by federal regulation and those exempted from federal regulation. Emergency Petroleum Allocation Act of 1973, §§ 4(a), 12, 15 U.S.C.A. §§ 753(a), 760a; N.Y. Tax Law § 182, subd. 12; U.S. C.A.Const. Art. 6, cl. 2.

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Robert Abrams, Atty. Gen., State of New York, Albany, N. Y., pro se and for defendant LaRocca; Shirley Siegel, Sol. Gen., Albany, N. Y., of counsel.

Paul, Weiss, Rifkind, Wharton & Garrison, New York City, for defendants Tully, Lynch and Koenig, constituting the New York State Tax Commission; Edward Costikyan, Simon H. Rifkind, New York City, of counsel.

ORDER

McCURN, District Judge.

Defendants have moved for an order dismissing these three actions for lack of subject matter jurisdiction pursuant to 28 U.S.C. § 1341. Plaintiffs in each action have moved for an order granting summary judgment in their favor. The Court has concluded after full hearing and after consideration of the arguments of counsel on both motions, the memoranda submitted

therewith, both in support and opposition, and the exhibits attached thereto, that the defendants' motion to dismiss should be denied and that plaintiffs' motions for summary judgment should be granted and has further concluded that in the interests of judicial economy and in fairness to the litigants, this Order should be issued forthwith with a Memorandum–Decision containing the Court's findings of fact and conclusions of law to follow, as to avoid the need for the hearing scheduled for September 10, 1980, on plaintiff New England Petroleum Corporation's application for a preliminary injunction with a consolidated hearing on the merits. It is therefore

ORDERED, ADJUDGED AND DECREED that:

1. The defendants' motion to dismiss the plaintiffs' complaints in these three actions is denied;

2. The plaintiffs' motions for summary judgment (a) declaring the anti–pass through provision of section 182(12)(a) of the New York Tax Law as added by L.1980 ch. 271, § 4, as amended by ch. 272, § 1, and ch. 272, § 2, invalid as pre–empted by the Emergency Petroleum Allocation Act, 15 U.S.C. §§ 751–760h and the Mandatory Petroleum Price Regulations, 10 C.F.R. Part 212, promulgated thereunder and thus void under the Supremacy Clause of the United States Constitution and (b) enjoining defendants, their delegates and successors in office from enforcing the anti–pass through provision against plaintiffs in these actions, are granted;

3. Entry of judgment in these actions is hereby stayed until September 17, 1980, and in the event that a Memorandum–Decision has not been issued by the Court by that time, the Court shall, upon notice to the

parties, extend the stay until such time as a decision is issued and the defendants have had a reasonable time to seek a further stay from the United States Court of Appeals for the Second Circuit.

IT IS SO ORDERED.

MEMORANDUM AND DECISION

Plaintiffs in these actions seek (a) a declaration that section 182(12) of the New York Tax Law, as added by L.1980, ch. 271 § 4 and ch. 272 § 2, which prohibits the pass–through of the State's recently enacted two (2%) percent gross receipts tax on certain oil companies is unconstitutional and thus invalid and (b) a permanent injunction enjoining the defendants from enforcing the anti–pass through provision. Relief is sought on the grounds that the anti–pass through provision (1) establishes a state price control rule which conflicts with the Federal Emergency Petroleum Allocation Act of 1973, §§ 1–19, 15 U.S.C. § 751–760h as amended, (EPAA), and the Federal Mandatory Petroleum Price Regulations, 10 C.F.R. Part 212 (Price Regulations) promulgated thereunder, and is thus void under the Supremacy Clause of the United States Constitution (U.S.Const. Art. VI, cl. 2); (2) impermissibly burdens interstate commerce and thus is void under the Commerce Clause of the United States Constitution (U.S.Const. Art. I, § 8, cl. 3); and (3) contravenes the Due Process Clause of the Fourteenth Amendment to the United States Constitution. (U.S.Const. Amend. XIV, § 1).

Plaintiffs in all three actions assert jurisdiction under 28 U.S.C. §§ 1331 and 1337. In addition, plaintiffs in the Mobil Oil and Amerada Hess actions claim that exclusive

original jurisdiction is vested in this Court by § 211 of the Economic Stabilization Act of 1970 (12 U.S.C. § 1904 note), as expressly incorporated by reference in § 5(a) of the EPAA (15 U.S.C. § 754(a)], and section 502(b) of the Department of Energy Organization Act, 42 U.S.C. § 7192(b).[1]

The three actions are presently before the Court on the defendants' motion to dismiss pursuant to the Tax Injunction Act, 28 U.S.C. § 1341 and the plaintiffs' motions for summary judgment under Rule 56 of the Fed.R.Civ.P. on their respective pre-emption claims.[2]

THE NEW YORK LEGISLATION

On June 18, 1980, the Governor of New York State signed into law two bills which impose an annual tax "upon every oil company equal to two per centum of its gross receipts from all sources, or the portion thereof allocated within the State as herein-

1. Plaintiffs in the Mobil Oil action also include section 210(a) of the Economic Stabilization Act of 1970, 12 U.S.C. § 1904 note in their exclusive jurisdiction claim.

2. A pretrial conference with regard to all three actions was held by the Court on July 29, 1980, for the purpose of establishing an accelerated litigation schedule. At that conference it was decided that defendants' motion to dismiss would be argued on August 20, 1980. It was further determined that motions for summary judgment to be brought by the plaintiffs would be heard on August 27, 1980, and would be limited to the parties' pre-emption claims, without prejudice to plaintiffs' seeking summary judgment on their Commerce and Due Process claims at a later date.

Plaintiff, New England Petroleum Corporation's motion for a preliminary injunction with a consolidated hearing on the merits pursuant to Rule 65 of the Fed.R.Civ.P. was scheduled to commence September 10, 1980.

after provided ...." (L.1980, ch. 271, § 4).[3] The tax is imposed on each company "for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity or of maintaining an office in this state, for all or any part of its taxable years." *Id.* Pursuant to the statute the term gross receipts covers all receipts with the exception of "[r]eceipts received by reason of any sale of fuel oil (excluding diesel motor fuel) used for residential purposes" and "receipts from any sale for resale to a purchaser which is an oil company subject to tax under this section." *Id.*

Revenue collected through the imposition of this new tax is earmarked to go into the "regional transportation operating and capital assistance fund", created by the legislation (L.1980, ch. 271 §§ 2, 11), and is to be used to provide operating and capital assistance to New York State's mass transportation system.

An additional provision of the State's new revenue raising plan prohibits the pass-through of the tax in the prices charged to consumers for products sold by the oil companies in New York State. The anti-pass through provision, which is set forth in subsection 12(a) of the new section 182 of the New York Tax Law, provides that:

> The tax imposed by this section and any penalty which may be assessed under this subdivision shall be a liability of the oil company, shall be paid by such company and shall not be included, directly or indi-

3. The full text of Senate Bills 10188 and 10261 is set forth in an Appendix to this Memorandum-Decision.

rectly, in the sales price of its products sold in this state.

L.1980, ch. 271, § 4(12)(a).

Under the new law, each oil company subject to the tax is required to file an annual report with the Commission of Taxation and Finance "certifying, under oath, that it has not included, directly or indirectly, in the sales price of its products sold in this state the tax imposed by this section." L.1980, ch. 271, § 4. Companies which are found to have passed on the cost of the new tax through increased product costs or who are found to have filed false reports in violation of the certification requirement are subject to a penalty equal to one hundred (100%) percent of the tax imposed for the year in which the violation occurs. L.1980, ch. 271, § 4(12)(b)(2).

The plaintiffs in these actions are oil companies within the meaning of the legislation involved in this litigation and are, therefore, subject to the gross receipts tax. Each, in the normal course of business, would generally pass on the cost of the new tax through increased petroleum product prices to customers in the taxing jurisdiction.

None of the plaintiffs challenges the imposition of the gross receipts tax itself. Rather, they challenge only the anti-pass through provision of § 182(12)(a), which is now in effect. As previously indicated, the plaintiffs' motions for summary judgment which are before the Court are limited to the pre-emption claims.

Analysis of the pre-emption claims shall necessitate a careful examination of the Federal EPAA and the Mandatory Price Regulations promulgated thereunder.

However, since the need for a determination on the preemption issue would disappear should the Court grant the defendants' motion to dismiss, that motion should be addressed and disposed of first.

MOTION TO DISMISS

Defendants contend that the Tax Injunction Act, 28 U.S.C. § 1341, divests the Court of jurisdiction in these actions. Plaintiffs disagree. Section 1341 provides that:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The defendants' argument for application of the Tax Injunction Act in these cases is basically as follows. Plaintiffs are challenging the validity of the anti-pass through provision of the new oil company franchise tax legislation. If plaintiffs are successful in having the anti-pass through invalidated, the gross receipts tax, by the terms of the New York legislation "shall cease to be in force and effect." L.1980, ch. 271, § 12, as amended by L.1980, ch. 272, § 5. Thus, according to the defendants, the plaintiffs' attack on the anti-pass through provision is in reality an attack on the tax itself. Since a decision by this Court striking down the anti-pass through provision would by virtue of the statutory mandate, effectively "enjoin, suspend or restrain the assessment, levy or collection of [a] tax under State law," defendants conclude that the Court is without jurisdiction pursuant to 28 U.S.C. § 1341.

Plaintiffs challenge the defendants' conclusion as to the applicability of 28 U.S.C. § 1341 in these actions and disagree as well

with defendants' assertion of the availability to plaintiffs of a "plain, speedy and efficient remedy" in the Courts of New York State. In disputing the existence of a State Court remedy acceptable under 28 U.S.C. § 1341, plaintiffs argue that exclusive jurisdiction over their pre-emption claim rests in federal district court by virtue of § 211 of the Economic Stabilization Act of 1970 (12 U.S.C. § 1904 note), which as previously pointed out was expressly incorporated by reference in § 5(a) of the EPAA, 15 U.S.C. § 754(a). Thus, according to plaintiffs there is no state court remedy available.

Since, for reasons to be discussed below, the Court does not find the Tax Injunction Act, 28 U.S.C. § 1341, applicable to these actions, it will not be necessary to reach plaintiffs' exclusive jurisdiction claim.

[1] The Tax Injunction Act embodies long-standing principles of equity and federalism which recognize "the imperative need of a State to administer its own fiscal operations."[4] *Tully v. Griffin*, 429 U.S. 68, 73, 97 S.Ct. 219, 222, 50 L.Ed.2d 227 (1976). Quoting from the decision of the Supreme Court in *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 298, 63 S.Ct. 1070, 1073, 87 L.Ed. 1407 (1943), the Court in *Tully* stressed that:

> "Interference with state internal economy and administration is inseparable from assaults in the federal courts on the validity of state taxation, and necessarily attends injunctions, interlocutory or final restraining collection of state taxes.

Tully v. Griffin, supra, 429 U.S. at 73, 97 S.Ct. at 222. *See also Matthews v. Rodgers*, 284 U.S. 521, 525-526, 52 S.Ct. 217, 219, 76 L.Ed. 447 (1932).

[2] Section 1341 has been found to apply equally to actions for declaratory or injunc-

tive relief. *Houston v. Standard–Triumph Motor Co.*, 347 F.2d 194, 198 (5th Cir. 1965); *Helmsley v. City of Detroit*, 320 F.2d 476, 478 (6th Cir. 1963); *First United Methodist Church v. City of Syracuse*, 489 F.Supp. 185 (N.D.N.Y.1980).

The Tax Injunction Act has served as the basis for dismissal on jurisdictional grounds of actions directly challenging the validity of a state tax, *See e. g. American Commuters Ass'n. v. Levitt*, 279 F.Supp. 40 (S.D.N.Y.1967) *aff'd.* 405 F.2d 1148 (2d Cir. 1969); *57th St. Management Corp. v. City of New York*, 456 F.Supp. 286 (S.D.N.Y.1978); actions attacking particular aspects of state taxing schemes, which bore a direct relationship to the successful assessment and collection of the tax, *See e. g. Mandel v. Hutchinson*, 336 F.Supp. 772 (C.D.Cal.1971) *aff'd*; 494 F.2d 364 (9th Cir. 1974); and

4. The legislative history of the Tax Injunction Act suggests two purposes behind its passage. The first was to eliminate the discrimination between citizens of a state who were confined to state court in challenging illegal tax assessments and foreign corporations who were able to take advantage of diversity jurisdiction in federal court.

Second, Congress wished to prevent foreign corporations from paralyzing state fiscal operations by refusing to pay state taxes and then commencing long and expensive litigation in federal court. S.Rep.No. 1035, 75th Cong., 1st Sess. (1937); 81 Cong.Rec. 1415–17 (1937). *See also Gurrett v. Bamford*, 538 F.2d 63, 72 (3d Cir.), *cert. denied* 429 U.S. 977, 97 S.Ct. 485, 50 L.Ed.2d 585 (1976); *Tramel v. Schrader*, 505 F.2d 1310, 1315–16 (5th Cir. 1975).

The Supreme Court, however, has consistently described the Act's passage as a confirmation of the traditional equity practice of federal courts' refraining from exercising jurisdiction over actions challenging state taxes as long as an adequate state remedy was available. *See Tully v. Griffin, supra*, 429 U.S. at 73, 97 S.Ct. at 222; *Great Lakes Dredge & Dock Co. v. Huffman, supra*, 319 U.S. at 298, 63 S.Ct. at 1073.

lawsuits challenging the procedures and methods employed in the levy or collection of a state tax. *See e. g. Czajkowski v. State of Ill.*, 460 F.Supp. 1265, 1271–74 (N.D.Ill.1977), *aff'd mem.*, 588 F.2d 839 (7th Cir. 1978); *Kimmey v. H. A. Berkheimer, Inc.*, 376 F.Supp. 49, 54–55 (E.D.Pa.1974), *aff'd. mem.*, 511 F.2d 1394 (3d Cir. 1975).

Section 1341 has, on occasion, been found inapplicable in cases involving an aspect of a state taxing scheme. In *Hargrave v. McKinney*, 413 F.2d 320 (5th Cir. 1969), the Court found that § 1341 did not require dismissal of an action in which the plaintiffs sought the collection and disbursement of certain county tax monies rather than an injunction on collection of taxes.

The Second Circuit in *Wells v. Malloy*, 510 F.2d 74 (2d Cir. 1975), refused to apply the Tax Injunction Act where the plaintiff challenged a Vermont statute which suspended the driver's licenses of individuals in default in payment of the state motor vehicle purchase and use tax. Writing for the Court, Judge Friendly stated that in enacting the Tax Injunction Act

> Congress was thinking of cases where taxpayers were repeatedly using the federal courts to raise questions of state or federal law *going to the validity of the particular taxes imposed upon them* (footnote references omitted)-not to a case where a taxpayer contended that an unusual sanction for non–payment of a tax admittedly due violated his constitutional rights .... (Emphasis supplied)

Id. at 77.[5]

There is no question but that the gross receipts tax on oil companies would cease to be in effect at a statutorily ordained time after a determination by the Courts that the anti–pass through provision now under

attack is invalid. Nonetheless, this Court as previously stated, does not believe that these cases fall within the jurisdictional proscription of the Tax Injunction Act.[5]

[3] The plaintiffs are not challenging the validity of the gross receipts tax nor are they attacking the statutorily prescribed administrative procedure for assessing, levying or collecting the tax. In fact, but for the "self–destruct" mechanism included in the legislation, a determination by this Court invalidating the anti–pass through provision would have absolutely no affect on the "assessment, levy or collection" of the gross receipts tax. 28 U.S.C. § 1341.

[4] Defendants describe the tax and the anti–pass through provision as a "single entity", with the latter provision being merely a "rule of tax incidence". Plaintiffs, on the other hand, argue that the anti–pass through provision is a state price control measure separate from the tax itself. The Court, having carefully reviewed the statutory language of S–10188 and 10261 agrees that the anti–pass through

5. The new Tax Injunction Act has also been found to be inapplicable in actions which are either brought by the United States or which although brought by a private individual or group could have been commenced by the United States. *See e. g. Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 473, 96 S.Ct. 1634, 1641, 48 L.Ed.2d 96 (1976); *Department of Employment v. United States*, 385 U.S. 355, 358, 87 S.Ct. 464, 466–67, 17 L.Ed.2d 414 (1966).

6. The Fifth Circuit Court of Appeals in *Hargrave v. McKinney, supra*, 413 F.2d at 326 cautioned that:

> Encroachments on the federal judiciary's power to vindicate rights allegedly guaranteed by the Constitution must be construed narrowly. *Cf. Phillips v. United States*, 1941, 312 U.S. 246, 251, 61 S.Ct. 480, 85 L.Ed. 800.

provision is a price control measure, rather than a rule of tax incidence. *See Schirtzinger v. Dunlop*, 489 F.2d 1307, 1310 (Em. App.1973) (treating pass–through regulations as a form of price control), and is of the opinion that the "self–destruct" mechanism contained in the legislation indicates an intent on the part of the state legislature to impose the gross receipts tax on oil companies *only* if it can in addition impose controls on the prices charged by the companies for products sold in New York State. The statement of legislative findings and declaration of purpose, following discussion of the State's mass transit fiscal crisis, provides that:

> It is also found that oil companies are currently reaping historically high profits. These increased profits do not result from the application of normal management techniques and strategies which any business uses to maximize profits, but rather result from the market conditions prevailing within the international oil industry, which are artificially inflating the price of petroleum products. In view of the high cost of petroleum, the importance of energy conservation and New York's dependence upon foreign energy suppliers, *oil companies have become businesses clothed with a public interest.* (Emphasis supplied)

L.1980, ch. 272, § 1.

The statement goes on to indicate an awareness on the part of the Legislature of the problems involved in supporting a mass transportation system in light of the "economic recession" and "inflationary cycle". *Id.* The Legislature, having determined that it did not wish to contribute to the "inflationary spiral" or "contribute to further increases in the price of petroleum

products to consumers" expressed the following legislative intent:

> The legislature hereby determines and declares that it is the public policy of the state to tax the gross receipts of oil companies and at the same time to prevent such gross receipts tax from fueling inflation by prohibiting the pass through of such tax to the consumers of this state.
>
> Therefore, it is the intent of the legislative that the gross receipts tax shall cease and terminate if such tax shall be permitted, either by judicial adjudication or by any formal opinion or ruling or in any other manner, to be included either directly or indirectly in the sales price of the products of the oil company.

The foregoing language suggests to the Court that the Legislators anticipated that the anti–pass through provision of the legislation might be challenged, apart from any attack on the tax itself, and that it might be struck down by the Courts with no threat to the continued collection of the tax. The fact that the State chose to make the taxes' survival dependent upon the survival of a provision which constitutes an exercise of the State's police power rather than taxing power does not, in the opinion of this Court, justify the application of the Tax Injunction Act.

The Court does not question the State's authority to enact a taxing statute, the survival of which is inextricably linked to

7. Although the State can label the anti–pass through provision any way it wishes, for the purpose of determining the applicability of 28 U.S.C. § 1341, the Federal definition of tax is to be employed. *Robinson Protective Etc. v. City of Philadelphia* 581 F.2d 371, 375 (3d Cir. 1978).

the survival of legislation constituting an exercise of the State's police power. However, it does not accept the defendants' argument that the question of constitutionality of such an exercise of police power can be insulated from Federal judicial scrutiny through a legislatively imposed linkage with a state taxing measure.[8] Therefore, the Court finds that it has jurisdiction in these actions under 28 U.S.C. §§ 1331, 1337, 2201 and 2202 and hereby denies the defendants' motion to dismiss pursuant to the Tax Injunction Act.

8. In seeking dismissal of these actions under 28 U.S.C. § 1341, defendants ask the Court to closely examine the long history of hostility to government by Federal injunction and the traditional Federal policy of non-intervention in certain state governmental matters.

In that regard, defendants point to the enactment of the Norris-LaGuardia Act of 1932, (29 U.S.C. §§ 105-115) which restricts the Federal Courts' power to issue injunctions in labor disputes and the Johnson Act of 1934, 28 U.S.C. § 1342, which prohibits Federal Courts from issuing injunctions of public utility rate orders and after which the Tax Injunction Act was "modeled". 81 Cong.Rec. 1415 (1937).

It is interesting to note, in that regard, that the Johnson Act, which deals with what are in effect price control measures (public utility rates) precludes the issuance of Federal Court injunctions only if "[t]he order does not interfere with interstate commerce". 28 U.S.C. § 1342(2). The Tax Injunction Act, of course, contains no such exception. While it is conjecture on the part of this Court, it would appear that Congress, in passing the Tax Injunction Act, anticipated that it would be applicable only in situations involving a state's internal fiscal affairs. Price controls, however, by their very nature are more apt to have an effect which reaches outside of the boundaries of the State, thus calling for the exception in the Johnson Act, and perhaps bolstering the Court's determination in these cases.

SUPREMACY CLAUSE

Plaintiffs seek judgment invalidating the anti–pass through provision on the grounds that it is pre–empted by the EPAA and the price control regulations promulgated thereunder and is thus void under the Supremacy Clause of the Constitution.

The Supremacy Clause provides that "... the Laws of the United States ... shall be the supreme Law of the Land, ... any thing in the Constitution or Laws of any State to the contrary notwithstanding." (U.S.Const. Art. VI, cl. 2).

The Supreme Court has frequently cautioned that in cases such as these involving a challenge to a State's police power under the Supremacy Clause that the Court must "start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157, 98 S.Ct. 988, 994, 55 L.Ed.2d 179 (1978), quoting from *Rice v. Sante Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152, 91 L.Ed. 1447 (1947). *See also Jones v. Rath Packing Co.*, 430 U.S. 519, 525, 97 S.Ct. 1305, 1309, 51 L.Ed.2d 604, *reh'g denied* 431 U.S. 925, 97 S.Ct. 2201, 53 L.Ed.2d 240 (1977).

[5, 6] There are two recognized grounds for finding pre–emption of state legislation by federal law.[9] The first is where Congress has chosen to completely occupy the field, to the exclusion of the states, in which

9. State statutes can also be pre–empted by Federal regulations properly promulgated under a Federal statute when there is a conflict between State and Federal regulations. *See e. g. Jones v. Rath Packing Co.*, supra, 430 U.S. at 536, 97 S.Ct. at 1315.

case states may not regulate within the field even when the regulation is in harmony with the federal scheme. *Jones v. Rath Packing Co., supra*, 430 U.S. at 525, 97 S.Ct. at 1309. The second is where, although Congress has not completely foreclosed state legislation in a particular area, the state law conflicts with a valid federal statute. *Ray v. Atlantic Richfield Co., supra*, 435 U.S. at 158, 98 S.Ct. at 994.

Congressional intent to totally occupy a particular field, precluding any state regulation may be "explicitly stated in the [federal] statute's language or implicitly contained in its structure and purpose." *Jones v. Rath Packing Co., supra*, 430 U.S. at 525, 97 S.Ct. at 1309. *See also City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 633, 93 S.Ct. 1854, 1859, 36 L.Ed.2d 547 (1973).

[7] The Supreme Court in *Rice v. Santa Fe Railroad, supra*, 331 U.S. at 230, 67 S.Ct. at 1152, explaining that an implied congressional intent could be "evidenced in several ways", stated that:

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for States to supplement it. [Citations omitted] Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. [Citations omitted] Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose.[10]

Under the second form of pre-emption, conflict voiding a state statute will be found:

"where compliance with both federal and

state regulations is a physical impossibility . . .," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142–143, 83 S.Ct. 1210, 1217, 10 L.Ed.2d 248 (1963), or where the state "law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz*, 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941); *Jones v. Rath Packing Co., supra*, 430 U.S. at 526, 540–541, 97 S.Ct. at 1317. Accord, *De Canas v. Bica*, 424 U.S. 351, 363, 96 S.Ct. 933, 940, 47 L.Ed.2d 43 (1976).

Ray v. Atlantic Richfield Co., supra, 435 U.S. at 158, 98 S.Ct. at 994–995.

[8] On occasion a pre-emption conflict may be found absent an actual conflict between state and federal law, where it is clear that Congress has addressed the issue and decided that the particular field should remain unregulated. As explained by the Supreme Court in *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 774, 67 S.Ct. 1026, 1030, 91 L.Ed. 1234 (1967) and recently reiterated in *Ray v. Atlantic Richfield Co., supra*, 435 U.S. at 178, 98 S.Ct. at 1004–1005:

> "where failure of . . . federal officials affirmatively to exercise their full au-

10. It must be kept in mind, however, that the existence of pervasive and complex regulations does not, in every case, demonstrate a Congressional intent to completely occupy a particular field. *See New York Dept. of Social Services v. Dublino*, 413 U.S. 405, 415, 93 S.Ct. 2507, 2514, 37 L.Ed.2d 688 (1973), in which the Supreme Court cautioned that:

> The subjects of modern social and regulatory legislation often by their very nature require intricate and complex responses from Congress, but without Congress necessarily intending its enactment as the exclusive means of meeting the problem . . . .

thority takes on the character of a ruling that no such regulation is appropriate or approved pursuant to the policy of the statute," States are not permitted to use their police power to enact such a regulation. *Bethlehem Steel Co. v. New York State Labor Relations Board*, 330 U.S. 767, 774, 67 S.Ct. 1026, 1030, 91 L.Ed. 1234 (1947); *Napier v. Atlantic Coast Line R. Co.*, 272 U.S. 605, 47 S.Ct. 207, 71 L.Ed. 432 (1926).

However, as recently pointed out by Judge Blumenfeld in *Mobil Oil Corp. v. Dubno*, 492 F.Supp. 1004, 1010 (D.Conn. 1980) a Connecticut case also involving an anti–pass through provision enacted in conjunction with a gross receipts tax on oil companies in that State:

> [the] mere failure to regulate, in and of itself, will rarely constitute an affirmative federal decision that "no such regulation is appropriate or approved" in light of federal policy. Rather, "[t]he pertinent inquiry [is] whether [federal authorities have] addressed and acted upon the question," whether they have given "careful consideration" to factors specified by Congress, and, after balancing the competing interests whether they have determined that no regulation, or limited regulation, is the proper way of achieving federal goals. *Ray v. Atlantic Richfield Co.*, . . . 435 U.S. at 174, 177, 98 S.Ct. at 1002, 1004. . . .

Id. at 1010.

[9] Finally, it should be noted that a state law cannot escape invalidation on pre–emption grounds because its purpose promotes a valid state interest if its effect "frustrates the full effectiveness of federal law." *Perez v. Campbell*, 402 U.S. 637,

651–652, 91 S.Ct. 1704, 1712, 29 L.Ed.2d 233 (1971).

The Court explained in *Perez* that:

> We can no longer adhere to the aberrational doctrine ... that state law may frustrate the operation of federal law as long as the state legislature in passing its law had some purpose in mind other than one of frustration. Apart from the fact that it is at odds with the approach taken in nearly all our Supremacy Clause cases, such a doctrine would enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy–other than frustration of the federal objective–that would be tangentically furthered by the proposed state law.

[10] Plaintiffs will be entitled to summary judgment on their pre–emption claims pursuant to Rule 56 of the Fed.R.Civ.P. "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving [parties are] entitled to judgment as a matter of law". Fed.R. Civ.P. 56(c).

After review of the papers submitted by the parties to the actions and analysis of the EPAA and the Price Regulations promulgated thereunder, the Court is of the opinion that there are no genuine issues as to any material fact on the pre–emption issue, and finds that plaintiffs are entitled to summary judgment on that claim.[11]

THE EPAA AND THE FEDERAL REGULATORY SCHEME

The Emergency Petroleum Allocation Act

Congress enacted the EPAA in 1973 in

response to the Arab oil embargo which had created shortages of various petroleum products which "constitute[d] a national energy crisis which [was] a threat to the public health, safety, and welfare and [could] be averted or minimized most efficiently and effectively through prompt action by the Executive branch of Government." 15 U.S.C. § 751(a)(3).

> The stated purpose of the Act was to:
>
> ... grant the President of the United States and direct him to exercise specific temporary authority to deal with *shortages* of crude oil, residual fuel oil, and refined petroleum products or *dislocations in their national distribution system.* ... [Emphasis supplied]

15 U.S.C. § 751(b).

As indicated in the preceding statutory language, the EPAA was initially considered by Congress to be a temporary measure enacted to deal with an emergency situation on a national level.

The President was required under the Act, to:

> promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation.

15 U.S.C. § 753(a).

11. There is no question but that the legal issues raised in plaintiffs' pre-emption claims are complex. The Second Circuit, however, in *S.E.C. v. Research Automation Corp.*, 585 F.2d 31, 33 (2d Cir. 1978) has made it clear that summary judgment is not necessarily inappropriate simply because the legal issues are complex.

Authorization was granted under the EPAA for the President to delegate his authority under the Act "to such officers, departments or agencies of the United States, or to any State (or officer thereof), as he deems appropriate." 15 U.S.C. § 754(b).

The Department of Energy (DOE), was created by Congress in August of 1977 (Department of Energy Organization Act, Pub. L.No. 95–91, § 201, 91 Stat. 569 (1977), and in February of 1978, the President delegated his authority under the Act to the Secretary of Energy who at the present time has control over the mandatory allocation program. Exec. Order No. 12038, 43 Fed.Reg. 4957 (Feb. 7, 1978).[12]

While the actual promulgation of regulations under the EPAA was left to the President, Congress did set forth guidelines defining the requisite area of coverage in the form of objectives which the regulations were to provide for "to the maximum extent practicable". 15 U.S.C. § 753(b)(1). Those objectives, set forth at 15 U.S.C. § 753(b)(1)(A)–(I) are:

> (A) protection of public health (including the production of pharmaceuticals), safety, and welfare (including maintenance of residential heating, such as individual homes, apartments, and similar oc-

12. The President first delegated his authority under the EPAA to the Federal Energy Office (FEO) in December of 1973, Exec. Order No. 11748, 38 Fed.Reg. 33575. In June of 1974 the President abolished the FEO and delegated his authority to the Federal Energy Administration (FEA), which had been created by Congress in the Federal Energy Administration Act of 1974, Pub.L. 93–275, § 3, 88 Stat. 97 (1974). Exec. Order No. 11790, 39 Fed.Reg. 23185 (June 27, 1974). Authority remained in the (FEA) until delegated to the Secretary of Energy in 1978.

cupied dwelling units), and the national defense;

(B) maintenance of all public services (including facilities and services provided by municipally, cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of, exploration for, and production or extraction of–

(i) fuels, and

(ii) minerals essential to the requirements of the United States, and for required transportation related thereto.

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

Congress, in addition, directed that:

In specifying prices (or prescribing the manner for determining them), the regulation under subsection (a) of this section–

(A) shall provide for a dollar–for–dollar pass through of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products at all levels of distribution from the producer through the retail level . . . .

In 1975, Congress added 15 U.S.C. § 760a to the EPAA. Energy Policy and Conservation Act. Publ.L.No.94–163, 89 Stat. 871 (1975). Whereas the imposition of allocation and price controls was mandatory under the 1973 Act, this section gave the President the authority to, in his discretion, and in accordance with the guidelines and procedural requirements set forth in the law, exempt "crude oil, residual fuel oil, or any refined petroleum product or refined product category" from the price and allocation regulations under the EPAA.

The criteria for amendment of regulations under § 753(a) is a determination by the President that:

such amendment is consistent with the attainment to the maximum extent practicable, of the objectives specified in section 753(b)(1) of this title and that the regulation, as amended, provides for the attainment to the maximum extent prac-

ticable, of such objectives.

15 U.S.C. § 760a(b).

Before any amendment to the regulations which pertains to either the allocation of or the price or manner of determining the price of crude oil, residual fuel oil or refined petroleum product could be promulgated, it had to be submitted for Congressional approval. 15 U.S.C. § 760a(C)(1) and (2).[13]

The President was also required to submit in support of the proposed amendment "a finding that such amendment [was] consistent with the attainment of the objectives specified in section 753(b)(1) of this title", and in the case of a proposed amendment to the price control regulations, "a finding that market forces [were] adequate to protect consumers and that exempting such oil or refined product category [would] not result in inequitable prices for any class of users of such oil or product." 15 U.S.C. § 760a(d)(1).

In addition, the President was required to submit with each proposed amendment a statement of his views as to:

"the potential economic impact (if any) of such amendment which, where practicable, shall include his views as to–

(i) the State and regional impacts of such amendment (including effects on governmental units);

(ii) the effects of such amendment on the availability of consumer goods and services; the gross national product; competition; small business; and the supply and availability of energy resources for use as a fuel or as feedstock for industry; and

13. Effective May 31, 1979, proposed amendments exempting products from the mandatory allocation and price regulations need not be submitted for Congressional approval. 15 U.S.C. § 760g; 44 Fed.Reg. 19425 (1979).

(iii) the effects on employment and consumer prices; and

(B) in the case of an exemption [from the price control regulations] an analysis of the effects of such amendment on the rate of unemployment for the United States, the Consumer Price Index for the United States, and the implicit price deflator for the gross national product.

15 U.S.C. § 760a(d)(2).

Under the 1975 amendment to the EPAA, the President was also given standby authority to at any time reimpose allocation and price control regulations on any previously exempted oil or refined product "upon a determination by him that such regulation or order is necessary to attain, and is consistent with, the objectives specified in section 753(b)(1) of this title." 15 U.S.C. § 760a(f).

Federal Regulation Under the EPAA

Comprehensive regulations governing the allocation and pricing of petroleum products were promulgated and implemented in response to the EPAA mandate. The petroleum pricing regulations, at subpart E, 10 C.F.R. §§ 2121.81–85 control the prices charged by refiners for petroleum products and specify the method to be used in computing price increases.

Under the pricing regulations the "maximum allowable price" which refiners can charge for covered products is "the weighted average price at which the covered product was lawfully priced in transactions with the class of purchaser concerned on May 15, 1973, . . . plus increased product costs and increased non–product costs incurred between the month of measurement and the month of May 1973". 10 C.F.R. § 212.82.

Initially, the regulations allowed refiners to pass–through non–product costs only upon notification to and approval of the FEA, the agency to which the President had first delegated his authority under the EPAA. However, in December of 1974 the FEA amended the regulations by recognizing eight specific categories of increased non–product costs, which refiners could pass–through without prenotification. 39 Fed.Reg. 42368 (December 5, 1974). The amendment also left the door open to seek agency permission for the pass–through of "disproportionately high non–product cost increases which [did] not fall into one of the categories defined by FEA", on a case–by–case basis. *Id.*

In January of 1977, the regulations concerning the pass–through of non–product costs were further amended to add additional categories.[14] 42 Fed.Reg. 5023 (January 27, 1977). As a result of this amendment, refiners were and are presently allowed to include in the price of covered products the dollar amount of their increased costs for "federal, state, and local property, excise, franchise and other similar taxes". 10 C.F.R. § 212.83(c)(2)(iii)(E)(7). The regulation specifically provides that "[f]ederal, state and local income taxes are not includable in this amount". *Id.*

The regulations also dictate the manner in which allowable cost increases are to be allocated among a refiner's customers. 10 C.F.R. § 212.83(c) and (h). The "equal application rule", at 10 C.F.R. § 212.83(h) encourages refiners to allocate increases equally among classes of purchasers by requiring that the refiner in determining the amount of its unrecouped cost increases to arrive at the maximum allowable price which can be charged in the subsequent month,

> . . . shall calculate its revenues as though the greatest amount of increased costs actually added to any May 15, 1973, selling price of the product concerned and included in the price charged to any class of purchaser, had been added, in the same amount, to the May 15, 1973, selling price of that product and included in the price charged to each class of purchaser.

Id.

[11] In other words, even if a refiner has not applied cost increases equally among all classes of purchasers, the refiner will be *deemed* to have done so and will not have the deemed amounts available for further increases.[15]

At the present time only automotive gasoline, propane and certain natural gas liquids remain subject to the previously described price control regulations (10 C.F.R. §§ 210.35, 212.56–62); all other petroleum products having been exempted in accordance with the procedures set forth at 15 U.S.C. § 760a.[16]

In each instance in which an administra-

14. For a complete list of non-product costs which may be included in the price of covered products see 10 C.F.R. § 212.83(c)(2)(iii)(E).

15. The non product cost increases cannot necessarily be included in product prices immediately as incurred. Rather the costs are placed in the refiners "bank", to be passed through in accordance with the price control regulations at 10 C.F.R. § 212.83(c). Both actual price increases and increases deemed to have occurred under the equal application rule reduce the amount in the refiners "bank". Thus, a refiner is penalized for failure to apply cost increases equally to all classes by the reduction in its "bank" for cost increases not actually made.

The regulations at 10 C.F.R. § 212.83(f) set forth the sequence in which increased costs shall be deemed to have been recovered.

tive decision has been made to exempt a particular petroleum product from regulation, it has been based upon findings (1) that the product is not in short supply; (2) that deregulation will not have an adverse impact on supply; (3) that competition and market forces provide adequate protection for consumers (or possibly greater protection); (4) that exemption will not result in inequitable prices for any class of users; and (5) that exemption is consistent with the attainment of the objectives set forth at section 4(b)(1) of the EPAA.

It should be noted that the price control regulations on presently exempt petroleum products have not been repealed, but rather have been "in effect converted to standby status, so that in the event of shortages or other occurrences which might require reimposition of controls, they may be quickly put into effect." 41 Fed.Reg. 30096, 30098 (July 22, 1976).[17]

ANALYSIS OF PLAINTIFFS' PRE-EMPTION ARGUMENT

The anti-pass through provision contained in the New York gross receipts tax legislation applies both to petroleum prod-

16. The products which have been exempted are residual fuel oil, 41 Fed.Reg. 13896 (April 1, 1976); No. 2 heating oil and No. 2-D diesel fuel, 41 Fed.Reg. 24518 (June 16, 1976); No. 1 heating oil, No. 1-D diesel fuel and kerosene, 41 Fed.Reg. 24518 (June 16, 1976); naphthas, gas oils, benzene, greases, hexane, lubricant base oil stocks, lubricants, special naphthas (solvents), toluene, unfinished oils, xylene, and other finished products, 41 Fed.Reg. 30096 (July 22, 1976); aviation turbine fuel (naphtha-based and kerosene-base) 41 Fed.Reg. 40452 (Sept. 20, 1976); aviation fuel (kerosene-type) and aviation gasoline, 44 Fed.Reg. 7070 (Feb. 5, 1979); and butane and natural gasoline. 44 Fed.Reg. 70118 (Dec. 6, 1979) Codified at 10 C.F.R. § 210.35.

ucts which are currently subject to the federal price control regulations and those which are presently exempt. Plaintiffs' pre-emption claims extend to both.

Applicable Test of Pre-emption

Plaintiffs rely upon both of the judicially recognized grounds for pre-emption of state law by Federal statutes and regulations. Defendants, however, contend that the question of pre-emption is not to be resolved through application of the "exclusive occupation" or "conflict" tests repeatedly articulated by the Supreme Court in Supremacy Clause cases, but rather exclusively through application of section 6(b) of the EPAA, 15 U.S.C. § 755(b). That section provides that:

> The regulation under section 753 of this title and any order issued thereunder, shall preempt any provision of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

Furthermore, defendants assert that the term "conflict" as used in section 6(b) is restricted to *actual* conflicts. Thus, according to defendants, the traditional judicial use of the term "conflict" as including instances where the consequences of a state law "sufficiently injure the objectives of the federal program", *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 583, 99 S.Ct. 802, 809, 59 L.Ed.2d 1 (1979) is improper in these cases.

17. 41 Fed.Reg. 30096, 30098 (July 22, 1976) concerns the exemption from price controls of naphthas and gas oils. The agency reports on the exemption of other products contain similar language concerning the conversion of the regulations to standby status. See n. 16, *supra*, for Federal Register citations relating to specific exemption determinations.

Defendants in asserting their position, rely on state court cases interpreting section 6(b) as well as a letter written by the Acting General Counsel of the DOE applying the actual conflict standard. Plaintiffs dispute the correctness of defendants' definition of "conflict" in section 6(b) and argue that, in any event, the section does not constitute the sole test of pre-emption in these cases. The Court agrees.

[12] Any possibility that the existence of a specific pre-emption provision in Federal legislation precludes application of the general pre-emption principles is quickly dispelled by the decision of the Supreme Court in *Jones v. Rath Packing Co., supra.* The Court in *Jones*, after concluding that an express pre-emption provision did not invalidate a state law, found that the finding did not resolve the case because the Court still had to "determine whether the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress". *Id.* 430 U.S. at 540-541, 97 S.Ct. at 1317.

Defendants' reliance on *Governor of the State of Maryland v. Exxon*, 279 Md. 410, 370 A.2d 1102 (1977), *aff'd on other grounds*, 437 U.S. 117, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978) which found section 6(b) provided the sole test for pre-emption is misplaced, since that case was decided prior to *Jones* which dictates a contrary result.

[13] Nor does the letter written by the Acting General Counsel for DOE in which he, relying exclusively on the section 6(b) pre-emption test, opined that the state anti-pass through provision did not conflict with the EPAA and its regulations, dictate a finding by this Court that section 6(b)

provides the exclusive pre–emption test.[18] While interpretation of statute by the agency charged with its administration is "entitled to substantial deference", *Quern v. Mandley*, 436 U.S. 725, 738, 98 S.Ct., 2068, 2076, 56 L.Ed.2d 658 (1978), it is clearly not decisive in every instance. The Supreme Court in *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S.Ct. 161, 164, 89 L.Ed. 124 (1944), explained that:

> . . . rulings, interpretations and opinions of the Administrator under [an] Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance. *The weight of such a judgment in a particular case will depend upon the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements and all those factors which give it power to persuade if lacking power to control.* (Emphasis supplied)

Before applying the foregoing standard to the Acting General Counsel's letter in this case, it should be pointed out that the DOE itself places relatively little weight on communications of this type. The regulations at 10 C.F.R. §§ 205.80–.86 set forth the procedure for obtaining official DOE interpretations. Those procedures were not

18. The letter was written by Eric J. Fygi, Acting General Counsel of the DOE on June 10, 1980, in response to a letter of the same date from the Governor of New York State, seeking an opinion as to whether the anti pass through provision would conflict with the EPAA and the regulations promulgated thereunder.

Although section 6(b) was not specifically referred to, it is clear that it was relied upon exclusively by Mr. Fygi in reaching his determination.

followed with regard to the opinion letter relied on by defendants in these cases. With respect to the type of opinion letter relied upon by the defendants herein, 10 C.F.R. §§ 205.80 provides that:

> Responses, which may include verbal or written responses to general inquiries or to other than formal written requests for interpretations filed with the General Counsel or his delegate or a Regional Counsel, *are not interpretations and merely provide general information.* (Emphasis supplied)

Under the *Skidmore* test, the opinion letter is entitled to little weight with regard to the pre–emption issue. After concluding that the anti–pass through provision was not pre–empted by Federal law, the author of the letter offered three caveats, one of which was that the time constraints he was under in responding to the request for an opinion, "did not permit an exhaustive analysis of the question". Thus, by his own admission, the Acting General Counsel's consideration of the pre–emption issue was less than thorough.

Furthermore, as shall be demonstrated at a later point, the conclusion reached in the letter is inconsistent with expressions of agency policy contained in several earlier DOE administrative opinions. Finally, the Court is convinced that the conclusion in the letter was, in light of *Jones*, reached either without reference to, or through the incorrect application of, judicially determined pre–emption principles.

Thus, the plaintiffs are not limited to section 6(b) in pursuing their pre–emption claims but rather are free to rely upon both of the judicially accepted grounds for pre–emption as well. However, since the Court is of the opinion that the anti–pass through provision must be invalidated under the

"conflict" standard, it will be unnecessary to determine whether Congress intended exclusive Federal control over the allocation and pricing of petroleum products, excluding the State from exercising its police power in those areas.[19]

The Pre-emption Conflict as to "Non-Exempt" Petroleum Products

As one of the sponsors of the EPAA, Senator Henry Jackson stressed that it was crucial that Congress "build a coordinated and rational fuels and energy policy". 119 Cong.Rec. 12317, *quoted in* S.Rep.No. 93-159, 93d Cong., 1st Sess. 21 (1973). Later, as floor manager of the bill, the Senator warned that:

> [I]f the Federal Government fails to establish effective regional or national allocation plans, we will invite piecemeal action by the States. Our fuel shortage problems are national problems; they must be recognized and resolved at the Federal level.

119 Cong.Rec. 17764 (1973).

Recognizing that the "self-regulating laws of supply and demand [were] not currently operating in the petroleum product market", the House Committee on Interstate and Foreign Commerce concluded that it was "imperative that the Federal government . . . accept its responsibility to intervene in these markets to preserve competition". H.R.Rep.No. 93-159, 93d Cong., 1st

19. In keeping with the traditional judicial reluctance to find Federal pre emption of a State's exercise of police power (*See Ray v. Atlantic Richfield, Co., supra*), the Court has attempted to make its finding of pre-emption in these cases on as narrow a ground as possible. In any event, the fact that Congress included an express pre-emption provision which did not result in occupation of the entire field, makes it unlikely that plaintiffs would be successful on that pre-emption ground.

Sess., *reprinted in* [1973] U.S.Code Cong. & Admin.News, pp. 2582, 2586.

As previously noted, one of the express statutory objectives to be considered in the promulgation of mandatory allocation and price regulations was the "equitable distribution of . . . refined petroleum products at equitable prices among all regions and areas of the United States. 15 U.S.C. § 753(b)(1)(f). Explaining the Congressional intent with regard to equitable prices, the Congressional conferees stated that:

> The reference to equitable prices in the bill is specifically intended to emphasize that one of the objectives of the mandatory allocation program is to prevent price gouging or price discrimination which might otherwise occur on the basis of current shortages. *On the other hand, it is contemplated that prices for allocated fuels will be set at levels or pursuant to methods which will permit adequate compensation to assure that private property is not implicitly confiscated by the government.* Most importantly, the President must, in exercising his authority, strike an equitable balance between the sometimes conflicting needs of providing adequate inducement for the production of an adequate supply of product and of holding down spiraling consumer costs. (Emphasis supplied)

H.R.Conf.Rep.No. 93–628, 93d Cong., 1st Sess., *reprinted in* [1973] U.S.Code Cong. & Admin.News, pp. 2702–2703.

Thus, it is clear that Congress looked upon the EPAA as legislation directing the establishment of a flexible national program for dealing with what was hoped to be a temporary crisis in an equitable manner, providing to the greatest extent possible for a balancing of the interests of both

consumers and refiners of petroleum products.

Plaintiffs[20] contend that the anti–pass through provision stands as an obstacle to the fulfillment of that Congressional goal and charge more specifically that the provision conflicts with the mandatory Federal price regulations by not allowing refiners and sellers of petroleum products to recapture increased costs engendered by state franchise taxes on a dollar–for–dollar basis.[21] According to plaintiffs, the New York gross receipts tax is a franchise tax which falls within that group of taxes which may under the regulations be passed on to purchasers of petroleum products through increase in prices. 10 C.F.R. § 212.83(c)(2)(iii)(E)(7). The anti–pass through provision, however, prevents the plaintiffs from passing on that cost in the prices charged for products sold within New York State.

Thus, recovery of increased costs incurred as a result of the gross receipts tax will be limited to amounts which could be passed through to purchasers in other states. However, plaintiffs argue that under the Federal regulations they will not be able to recover the entire amount from out–of–state purchasers because of the equal application rule. 10 C.F.R. § 212.83(h). Under

20. Plaintiff NEPCO alleges in its complaint that its New York sales are limited to residual fuel oil, presently exempt from regulation under the EPAA. Therefore, the discussion concerning nonexempt products does not apply to NEPCO.

21. Plaintiffs in the Mobil Oil case allege in addition that the anti–pass through provision conflicts with the mandatory price regulations by imposing a sequence of cost recovery in conflict with the sequence set forth in the Federal regulations at 10 C.F.R. § 212.83(f). It will, however, be unnecessary for the Court to reach that argument.

that rule, as previously explained, New York prices would be deemed to have increased in the same amount as those in other states, and that amount would be lost from plaintiffs' "banks" and unavailable for future recovery.

Defendants argue in response that (a) the New York gross receipts tax is not one which may be passed on to purchasers under 10 C.F.R. § 212.83(c)(2)(iii)(E)(7), and (b) the Federal price control regulations merely set "maximum allowable prices" and bestow no right upon refiners and sellers to charge those prices.[22] The Court finds both of these arguments unconvincing.

In asserting the position that the New York gross receipts tax is not one which can be passed through under 10 C.F.R. § 212.-83(c)(2)(iii)(E)(7), defendants argue that the intent behind the regulation allowing the pass through of certain taxes (i. e., proper-

22. Defendants also renew the argument first made in conjunction with the motion to dismiss that the anti-pass through provision is not a price control measure because although it admittedly has an incidental effect on price, it does not "fix" prices. Rather, defendants claim it is a "rule of tax incidence", and as such should not be pre-empted by Federal law in this instance.

The Court remains convinced that regardless of the terminology employed by defendants, the anti-pass through provision is indeed a price control measure. *See United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 222-223, 60 S.Ct. 811, 844, 84 L.Ed. 1129 (1940) (finding that under the Sherman Antitrust Act price fixing is not limited to the setting of uniform or inflexible prices); *Perez v. Campbell, supra*, 402 U.S. at 651-652, 91 S.Ct. at 1712 (pre-emption is not determined by reference to state statutory labels).

The anti-pass through, regardless of what defendants call it, "distorts market conditions by keeping prices artificially low in [New York]". *See Mobil Oil v. Dubno, supra*, 492 F.Supp. at 1013 n. 10.

ty, excise, franchise and similar taxes) while not permitting the pass through of income taxes was to distinguish between those taxes which the taxing authority expected to be passed on and those which were to be born by the taxpayer. Defendants then reason that the regulation should, therefore, be read as a presumption to operate only in the absence of an explicit expression of intention. Defendants, however, fail to offer support for this theory.

[14] Defendants also seem to suggest that the gross receipts tax, because it taxes *all* receipts and not merely receipts from sales, is actually along the lines of an income tax, and cannot be passed through under 10 C.F.R. § 212.83(c)(2)(iii)(E)(7) on that basis.[23] Neither is this claim convincing, especially in light of the following statutory language contained in the tax legislation:

> § 182 Additional *franchise* tax on certain oil companies. 1. Notwithstanding any other provision of this chapter, or of any other law, an annual tax is hereby imposed upon every oil company . . . *for the privilege of exercising its corporate franchise* . . . . (Emphasis supplied)

L.1980, ch. 271, § 4.

The foregoing language establishes to the satisfaction of this Court that the gross receipts tax is a state franchise tax which falls within that group of taxes which may

23. Defendants recognize that no deductions are allowed as they generally are with an income tax, but in support of their argument that the gross receipts tax is an income tax, justify the failure to allow deductions by the low tax rate.

be passed through under 10 C.F.R. § 212.-83(c)(2)(iii)(E)(7).[24]

Defendants argue, however, that even if the regulation allows plaintiffs to increase prices of non–exempt petroleum products to reflect costs incurred by the New York gross receipts tax, it does not give them an absolute right to do so. Rather, according to defendants, the regulations merely establish "maximum allowable prices", and, therefore, no conflict is presented by the State's setting more restrictive price limitations. Defendants' position simply does not hold up under scrutiny.

[15] As previously noted, Congress, in directing the President to promulgate mandatory allocation and price regulations under the EPAA, provided him with guidelines in the form of a list of objectives to be met to the "maximum extent practicable". 15 U.S.C. § 753(b)(1)(A)–(I). Therefore, in determining whether the anti–pass through provision "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress", *Ray v.*

24. Defendants point out that 10 C.F.R. § 212.-83(c)(2)(iii)(E)(7) allows only taxes which are attributable to refining operations to be passed through. Since the New York gross receipts tax taxes all of an oil company's receipts, and not just those attributable to refining operations, defendants suggest that there is a material issue of fact precluding summary judgment as to what portion, if any, of the gross receipts tax can be passed through as attributable to refining operations.

The Court, however, does not agree that this question raises a material issue of fact. Even if oil companies could not pass through all of the costs incurred through the tax, any proportion allocatable to refining (and clearly some portion would be) which could be passed through but for the anti–pass through provision presents a conflict problem.

Atlantic Richfield Co., supra, the Court must look not only at *particular* the regulation but at the objectives which the agency sought to further by its promulgation.[25] If the consequences of the anti–pass through provision "sufficiently injure the objectives of the federal program", *Hisquierdo v. Hisquierdo, supra*, a conflict must be found and the provision invalidated under the Supremacy Clause. Such a conflict exists in this instance with regard to non–exempt petroleum products.

The regulations involved in plaintiffs' pre–emption challenge are 10 C.F.R. § 212.-83(c)(2)(iii)(E)(7) and the equal application rule. 10 C.F.R. § 212.83(h). One of the objectives at 15 U.S.C. § 753(b)(1), the "preservation of an economically sound and competitive petroleum industry", [15 U.S.C. § 753(b)(1)(D)] is furthered by allowing refiners to pass through those taxes which are recognized as costs of doing business. 10 C.F.R. § 212.83(c)(2)(iii)(E)(7). By precluding the pass through of the New York gross receipts tax to purchasers in New York, the anti–pass through provision conflicts with the articulated policy allowing the pass through, and the more general Congressional intent that prices for petroleum products "be set . . . pursuant to methods which will permit adequate compensation to assure that private property is not implicitly confiscated by the government". H.R.Conf. Rep.No. 93–628 *supra*, U.S.Code Cong. & Admin.News 1973, p. 2703.

25. Referring to the objectives set forth at 15 U.S.C. § 753(b)(1), the Temporary Emergency Court of Appeals in *Mobil Oil v. Department of Energy*, 610 F.2d 796, 801 (Em.App.1979) explained that:

> No single factor is inherently more important than any of the other factors. Instead, as this Court has held, all nine factors are to be balanced objectively.

Another of the objectives, set forth at 15 U.S.C. § 753(b)(1)(F), provides for the "equitable distribution of . . . refined petroleum products at equitable prices among all regions and areas of the United States". The equal application rule exists to help insure equitable pricing on a national basis. The application of the rule, and the detrimental effect that it would have on the oil companies' ability to increase prices on a dollar–for–dollar basis to cover costs incurred through the imposition of the New York gross receipts tax have already been explained.[26]

[16] However, perhaps even more crucial than the harm which would be done to plaintiffs through application of the rule, which in itself suggests an impermissible conflict, is the fact that the anti–pass through provision flies in the face of the specific Congressional objective which the equal application rule was enacted to further. While the Federal policy supports "equitable distribution" and "equitable prices" among "all regions and areas of the United States", 15 U.S.C. § 753(b)(1)(F), New York is seeking to insulate its citizens from increased costs resulting from a local tax while allowing the burden of the tax to

26. Defendants suggest that there is no conflict in these cases with regard to the equal application rule because plaintiffs presently have "banks" which are so large that it is unlikely they will be depleted by the time price controls expire in September of 1981, and the only material aspect of the rule is to reduce those "banks".

While defendants assert that the size of plaintiffs' "banks" raises a material issue of fact, the Court once again disagrees. The conflict exists regardless of the size of plaintiffs' "banks".

fall upon the shoulders of non–New Yorkers.[27]

Such a result frustrates, not only express Congressional policy, but thwarts the articulated DOE policy of waiving the equal application rule and allowing local taxes to be passed through solely to customers within the taxing jurisdiction. In *Mobil Petroleum Company*, 5 DOE § 81, 188 at 82, 989 (1977) the DOE found that a Guam gross receipts tax could be recovered solely in the taxing jurisdiction, reasoning that:

> [I]f Mobil Petroleum were required to recover a portion of the Guam gross receipts tax by increasing its prices for covered products sold to purchasers outside the territory of Guam, those non–Guamian purchasers would in effect be required to bear a portion of the burden of a Guamian tax on Guamian consumption of petroleum products. *This result would frustrate one of the objectives that Congress sought to further in the Emergency Petroleum Allocation Act of 1973 (EPAA), Pub.L. No. 93–159, that of providing for the "equitable distribution of . . . refined petroleum products at equitable prices among all regions and areas of the United States."* (citation omitted)

27. Defendants attempt to differentiate the New York gross receipts tax from other gross receipts taxes which have been imposed on oil companies primarily because it taxes *all* receipts from *all* sources. L.1980. ch. 271 § 4. However, the tax is limited through the application of a statutory formula to the portion of receipts allocated to the State of New York, making it, in effect, a local tax. The fact that it applies to all sources of income rather than only receipts from the sale of petroleum products suggests only that there will conceivably be sources of income upon which the tax must be paid but which will be unrelated to the EPAA or the mandatory price regulations.

Because the anti–pass through provision conflicts in the manner discussed with 10 C.F.R. §§ 212.83(c)(2)(iii)(E)(7) and 212.-83(h), as well as the aforementioned objectives at 15 U.S.C. § 753(b)(1)(D) and (F) and the Congressional intent as expressed in the legislative history, its validity cannot be upheld under the Supremacy Clause with regard to petroleum products presently subject to the mandatory price controls.[28]

The Pre–emption Conflict as to "Exempt" Petroleum Products

As already pointed out, the 1975 amendment to the EPAA gave the President, or his delegate, the authority to exempt petroleum products from regulation in accordance with the procedures contained in 15 U.S.C. § 760a. Many of the petroleum products subject to the New York gross receipts tax are presently exempt from regulation. As also previously noted, plaintiffs claim that the anti–pass through provision passed in conjunction with that tax is pre–empted as to those exempt products because it conflicts with the Federal regulatory policy under the EPAA.

An almost identical pre–emption issue was recently before the District Court in Connecticut in *Mobil Oil v. Dubno, supra.* The State of Connecticut enacted legisla-

28. Although compliance with the mandatory price control regulations and the anti–pass through provision would not be impossible so as to create an *actual* conflict under 15 U.S.C. § 755(b), as defendants suggest that section should be read, the anti–pass through provision would be pre–empted under that section by use of the judicially accepted definition of conflict in pre–emption cases.

The section refers only to programs "for the allocation of ... petroleum products". However, legislative history suggests and defendants agree that programs for the pricing of petroleum products would be included.

tion imposing on oil companies a two percent tax on their gross receipts from sales in Connecticut. Section 13(a) of the Connecticut legislation contained a statement that the intent of the legislation was that the tax would constitute a part of each company's operating overhead. Section 13(b) forbids companies from raising wholesale prices in Connecticut on petroleum products presently exempt from regulation, by any higher amount than the average amount by which it raises prices "in all ports on the eastern coast of the United States." *Id.*, 492 F.Supp. at 1006.

Judge Blumenfeld found that section 13(b) was a price control mechanism which frustrated the effectiveness of Federal law in a number of ways. He proceeded to declare the section unconstitutional as in violation of the Supremacy Clause.

There are obvious differences in the legislation, although none quite so drastic as defendants would have the Court believe. In fact, the Court sees none which in itself would dictate a contrary result in this action. If anything, the New York anti-pass through constitutes an even more imposing price control regulation in that it applies to both exempt and non-exempt petroleum products and, in addition, attempts to totally insulate New York from any of the burden of the tax, thus creating the possibility for even more severe market distortion than with the Connecticut case.

The decision in *Mobil Oil Corp. v. Dubno*, was reached after a thorough analysis of the legislative history of the EPAA, the statutory language, and the regulations themselves. As discussed below, this Court believes that the decision in *Dubno* is correct, and that Judge Blumenfeld's analysis is for the most part applicable in these cases.

Plaintiffs in these actions argue that in choosing to exempt certain petroleum products from price control regulations, the DOE (or predecessor agency) did not intend to cease regulating with regard to those products,[29] thereby presumably leaving the area wide open for the imposition of state regulation. Instead plaintiffs contend, the Federal authorities have "'addressed and acted upon the question'", and after giving "'careful consideration' to factors specified by Congress, they have determined that no regulation, or limited regulation, is the proper way of achieving federal goals". *Mobil Oil Corp. v. Dubno, supra*, 492 F.Supp. at 1010, *quoting in part from Ray v. Atlantic Richfield Co., supra.*

Furthermore, plaintiffs assert, allowing operation of the anti–pass through provision would frustrate the satisfaction of the objectives set forth in the EPAA at 15 U.S.C. § 753(b)(1). There is ample support for plaintiffs' position in the legislative history of the Act, the statutory language and the manner in which the regulations have been converted to standby status with the DOE maintaining a close watch over supply and market conditions.

When enactment of the EPAA was originally being considered by Congress, the Committee conferees noted that:

> The committee recognizes that [price controls] necessarily distort the economy and interfere with a free market mechanism. It is the intent of this legislation that

29. Plaintiffs in the Mobil Oil case rely for support on the decision in *Consumers Union of U. S., Inc. v. Sawhill*, 525 F.2d 1068 (Em.App. 1975) (en banc), in which a regulation which directed that prices be allowed to be determined by free market was still classified by the Court as a regulation within section 4(a) of the EPAA.

> economic distortion and interference be minimized to the extent practicable. The President should assure himself that his actions interrupt existing supply mechanisms only when necessary to permit the accomplishment of [EPAA] objectives.

H.R.Conf.Rep.No. 93–628, 93d Cong., 1st Sess. 24 (1973), U.S.Code Cong. & Admin. News 1973, p. 2701. Thus, it is clear that Congress considered price controls a necessary (but hopefully temporary) evil.

While the EPAA was enacted as a temporary measure to deal with a crisis situation during discussions, in 1975, concerning the enactment of the Energy Policy and Conservation Act (EPCA), Publ.L. No. 94–163, 89 Stat. 871 (1975), Congress recognized that:

> The fundamental reality is that this nation has entered a new era in which energy resources previously abundant, will remain in short supply, retarding our economic growth and necessitating an alteration in our life's habits and expectations. *The Arab embargo raised public consciousness of energy problems and underscored more effectively than could any other event the need for policy decisions at the national level.* (Emphasis supplied)

H.R.Rep.No. 94–340, 94th Cong., 1st Sess., *reprinted in* [1975] U.S.Code Cong. & Admin.News, pp. 1762, 1963.

The recognition on the part of Congress that the United States was entering a new era with regard to energy resources which necessitated a national energy policy belies defendants' argument that the 1975 amendment to the EPAA signaled a return to the *status quo ante*, allowing states to regulate freely with regard to petroleum products.

While defendants correctly point out that

in amending the EPAA in 1975, Congress intended "a gradual return to an unregulated market", S.Conf.Rep.No. 94–516, 94th Cong., 1st Sess. 208 (1975), U.S.Code Cong. & Admin.News 1975, p. 2045, the return to a petroleum market totally unfettered by Federal controls has not yet occurred even as to exempt products.

Just as the price control regulations themselves must provide for the satisfaction of the objectives set forth at 15 U.S. § 753(b)(1), any decision to exempt a product from the regulations must likewise be based upon "a finding that such amendment is consistent with the attainment of the objectives specified in section 753(b)(1) . . .," 15 U.S.C. § 760a(d)(1). Therefore, exempting a product from the price control regulations, rather than constituting an end to Federal regulation over those products, represents an affirmative administrative determination that "no such regulation is appropriate . . . pursuant to the policy of the statute . . .," *Ray v. Atlantic Richfield Co., supra. See also Mobil Oil Co. v. Dubno, supra.*

Furthermore, agency action taken thus far under 15 U.S.C. § 760a has reflected a cautious, watchful approach to deregulation. As previously noted, price control regulations formerly applicable to presently exempt products have not been repealed but put on standby status to allow quick reactivation if necessary. In addition, the DOE has continued to closely monitor the market situation with regard to the exempt products.[39] This Court is not required to, nor is it in a position to, make a finding as

39. For example, a public hearing was scheduled in 1977 on the need for a price monitoring system for middle distillates. Such a system was adopted. 42 Fed.Reg. 54444 (Oct. 6, 1977).

to when, if ever, a return to an unregulated market will occur. It may be on September 30, 1981, the date presently set for expiration of Federal price controls. 15 U.S.C. § 760g. Then again, in light of the Congressional recognition that the United States has entered a "new era" necessitating "policy decisions [with regard to energy resources] at the national level", H.R. Rep.No. 94–340, *supra*, U.S.Code Cong. & Admin.News 1975, p. 1762, Federal control may extend far beyond that date.

In any event, at the present time, regulatory control over even the exempt petroleum products is, as previously demonstrated, still substantial. As with the Connecticut price control legislation, the anti–pass through provision in the New York gross receipts tax "frustrates the full effectiveness" of the present Federal regulatory policy under the EPAA in several ways.

Aside from imposing price controls in an area which Federal authorities have determined should be free of price regulation, the anti–pass through provision conflicts with the objectives which the Federal agencies were obligated to consider in making decisions to deregulate. Just as was recognized in *Mobil Oil Co. v. Dubno, supra*, 492 F.Supp. at 1014:

> preventing suppliers from fully recovering, through prices charged in [New York], the true economic cost of products sold in [New York] . . . will induce suppliers to sell their products in other states, risking the very "supply problems" and "market distortions", that DOE in removing controls, endeavored to eliminate.

The provision presents a serious threat to the "equitable distribution of . . . refined

petroleum products at equitable prices among all regions and areas of the United States," 15 U.S.C. § 753(b)(1)(F), and "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress" in enacting the EPAA. *Ray v. Atlantic Richfield Co., supra.*[21]

Because the anti–pass through provision conflicts with the Federal policy under the EPAA with regard to presently exempt petroleum products in the foregoing manner, its validity cannot be upheld under the Supremacy Clause.

RELIEF

This Memorandum–Decision explains the reasoning behind the September 4, 1980, Order of this Court, denying defendants' motion to dismiss and granting plaintiffs' motions for summary judgment declaring the anti–pass through provision of the New York gross receipts tax unconstitutional as in violation of the Supremacy Clause and enjoining its enforcement. The Court by this Memorandum–Decision reaffirms its findings as contained in the September 4, 1980, Order and hereby incorporates this Decision therewith.

IT IS SO ORDERED.

APPENDIX B

639 FEDERAL REPORTER, 2d SERIES
MOBIL OIL CORP. v. TULLY

Cite as 639 F.2d 912 (1981)

MOBIL OIL CORP., Atlantic Richfield Co., United Refining Co., Inc., and Gulf Oil Co., Chevron U.S.A. Inc., Amoco Oil Co., Texaco Inc. and Exxon Corp., Plaintiffs-Appellees,

v.

James H. TULLY, Jr., Thomas H. Lynch, and Francis Koenig, Constituting the New York State Tax Commission; Robert Abrams, Attorney General of the State of New York; and James L. LaRocca, Commissioner of the New York State Energy Office, Defendants-Appellants.

NEW ENGLAND PETROLEUM CORP., Plaintiff-Appellee,

v.

James H. TULLY, Jr., Commissioner of Taxation and Finance of the State of New York, and Robert Abrams, Attorney General, State of New York, Defendants-Appellants.

AMERADA HESS CORP., Plaintiff-Appellee.

v.

James H. TULLY, Jr., Thomas H. Lynch and Francis Koenig, Constituting the New York State Tax Commission; Robert Abrams, Attorney General of the State of New York, and James L. LaRocca, Commissioner of the New York State Energy Office, Defendants-Appellants.

No. 482, Docket 80-7785.

United States Court of Appeals,
Second Circuit.

Argued Oct. 30, 1980.

Decided Jan. 28, 1981.

Oil companies brought action seeking declaratory and injunctive relief with respect to antipass-through provision of New York statute imposing gross receipts tax on oil companies. On plaintiffs' motion for summary judgment and defendants' motion to dismiss, the United States District Court for the Northern District of New York, Neal P. McCurn, J., 499 F.Supp. 888, found action was not barred and antipass-through provision was preempted by federal regulations, and New York State Tax Commission and Attorney General appealed. The Court of Appeals, Mulligan, Circuit Judge, held that: (1) the antipass-through provision of New York State's tax upon gross receipts of oil companies doing business within state was not insulated from scheduled scrutiny by the Anti-Injunction Act, and (2) although State had right to place legal incidents of tax upon oil companies, it went beyond its taxing powers and employed its police powers in determining that oil companies could not recover their costs from consumer directly or indirectly.

Appeal dismissed in part and stay of enforcement continued.

1. War and National Emergency ⇐133

The Temporary Emergency Court of Appeals had jurisdiction over question of whether impermissible conflict existed between antipass-through provision of New York State's tax upon gross receipts of oil

companies doing business within the state and federal statute, regulations and congressional policy. N.Y.Tax Law § 182; Emergency Petroleum Allocation Act of 1973, § 2 et seq., 15 U.S.C.A. § 751 et seq.

2. Courts ⇐508(6)

Antipass-through provision of New York State's tax upon gross receipts of oil companies doing business within state was not insulated from federal scrutiny by the Anti-Injunction Act. N.Y.Tax Law § 182; 28 U.S.C.A. § 1341.

3. Federal Courts ⇐1134

Court of Appeals has concurrent jurisdiction in an appeal from a final order of a district court over independent issues which do not present an Emergency Petroleum Allocation Act question. Emergency Petroleum Allocation Act of 1973, § 2 et seq., 15 U.S.C.A. § 751 et seq.

4. Taxation ⇐1262

Although state has right to place legal incidents of tax upon oil companies, it went beyond its taxing powers and employed its police powers in determining that oil companies could not recover their costs from a consumer directly or indirectly. 28 U.S.C.A. § 1341; N.Y.Tax Law § 182.

Thomas R. Trowbridge, III, New York City (Donovan, Leisure, Newton & Irvine, New York City, John M. Freyer, Bond, Schoeneck & King, Syracuse, N. Y., of counsel), for plaintiffs-appellees Mobil Oil Corp., Atlantic Richfield and United Refining Co.

Edward F. Gerber, Syracuse, N. Y. and Arthur C. Vangeli and Sydney M. Avent, Philadelphia, Pa., of counsel, for Gulf Oil Corp.

George Weisz, New York City (Cleary, Gottlieb, Steen & Hamilton, New York City, James C. Blair, New York City, Warner Bouck, Bouck, Holloway & Kiernan, Albany, N. Y., of counsel), for plaintiff-appellee New England Petroleum.

Stanley D. Robinson, New York City (Kaye, Scholer, Fierman, Hays & Handler, New York City, William L. Allen, Jr., Hancock, Estabrook, Ryan, Shove & Hust, Syracuse, N. Y., of counsel), for plaintiff-appellee Amerada Hess Corp.

Edward Costikyan, and Simon H. Rifkind, New York City (Paul, Weiss, Rifkind, Wharton & Garrison, New York City, of counsel), for defendants-appellants Tully, Lynch and Koenig.

Shirley Adelson Siegel, Sol. Gen., State of New York, Albany, N. Y., of counsel, for Robert Abrams and defendant-appellant LaRocca.

Before MULLIGAN and VAN GRAAFEILAND, Circuit Judges, and WERKER, District Judge.*

MULLIGAN, Circuit Judge:

On June 18, 1980, New York Governor Hugh Carey signed into law two bills, Senate Bills 10182 and 10261, which created a new Section 182 of the New York Tax Law and established a 2% tax on the "gross receipts" of oil companies doing business in New York. 1980 N.Y. Laws, ch. 271, 272 (N.Y.Act); N.Y.Tax Law § 182 (McKinney Supp.1980). The express purpose of the tax is to raise additional revenue to aid the State's ailing public transportation system. N.Y. Act, ch. 272 § 1. Indeed, it has been

* United States District Judge for the Southern District of New York, sitting by designation.

estimated by the New York State Division of the Budget that the new tax would raise an additional 235 million dollars annually. Oil companies were reported to have reaped unjustifiably high profits as a result of market conditions and were therefore deemed to be an appropriate source of revenue. N.Y. Act, ch. 272 § 1. In order to ensure that the oil companies, and not the consuming public, bore the burden of the tax, the legislature provided in Section 4(12)(a) of the Act (the anti-passthrough provision) that:

> [t]he tax imposed by this section and any penalty which may be assessed under this subdivision shall be a liability of the oil company, shall be paid by such company and shall not be included, directly or indirectly, in the sales price of its products sold in this state.

N.Y.Tax Law § 182(12)(a) (McKinney Supp. 1980). Companies which are found to have passed on the cost of the tax through product pricing are subject to a penalty equal to 100% of the tax liability for the year in which the violation occurs. N.Y.Tax Law § 182(12)(b)(2). In addition, the legislature hinged the viability of the tax itself upon the validity of the anti-passthrough provision. In 1980 N.Y. Laws, ch. 272, § 5 (the self-destruct provision), the legislature provided that:

> [i]f the provisions of [the anti-passthrough section] is [sic]: (i) adjudged by any court of competent jurisdiction to be invalid and after exhaustion of all further judicial review; or (ii) held in a formal opinion or ruling issued by the federal Economic Regulatory Administration or any other federal agency of competent jurisdiction to be violative of the provisions of the federal Emergency Price Allocation Act of 1973, as amended,

or the federal Mandatory Petroleum Price Regulations (10 CFR 212) promulgated pursuant thereto, or any successor federal law or regulation, and thereby rendered inoperative, and after exhaustion of all appeals therefrom, then, in either of such events, all of the provisions of this act shall cease to be in force and effect [ten days thereafter].

The plaintiffs-appellees, ten oil companies concededly subject to the tax, instituted these actions in the Northern District of New York against the defendants-appellants, New York State Tax Commission, New York State Attorney General and the Commissioner of the New York State Energy Office, seeking declaratory and injunctive relief. The oil companies argued that the anti-passthrough provision was invalid (a) because it conflicted with the Emergency Petroleum Allocation Act, 15 U.S.C. § 751 et seq. (EPAA) and the Federal Mandatory Petroleum Price Regulations, 10 C.F.R. §§ 212.1, 212.82 and 212.83, issued thereunder and was therefore preempted by the Supremacy Clause of the United States Constitution (U.S.Const. art. VI, cl. 2); and (b) because it violated the Commerce and Due Process Clauses of the United States Constitution. At no time did the plaintiffs attack the validity of the tax itself. The plaintiffs, after expedited discovery, moved for summary judgment while the defendants moved to dismiss the actions for lack of federal jurisdiction under 28 U.S.C. § 1341, the Tax Injunction Act. By order dated September 4, 1980, the District Court denied the defendants' motion to dismiss and granted summary judgment in favor of the plaintiffs.

In a memorandum and decision dated September 19, 1980, Judge Neal C. McCurn held that the anti-passthrough provision

was in effect a price control and not a rule of tax incidence. *Mobil Oil Corp. v. Tully*, 499 F.Supp. 888 at 894 (N.D.N.Y.1980). The court therefore held that the Tax Injunction Act, 28 U.S.C. § 1341 was inapplicable. *Id.* In addition, because the "price control" provision was found to be in conflict with the EPAA and the regulations issued thereunder, Judge McCurn declared that the provision was preempted by federal law with respect to exempt and non-exempt petroleum products. *Id.* at 907, 910. Judgment was entered on September 19, 1980 but on motion by the defendants-appellants, the District Court stayed enforcement until October 31, 1980. *Mobil Oil Corp. v. Tully*, 499 F.Supp. 888 (N.D.N.Y. 1980). The stay was continued by this court in a ruling from the bench at oral argument on October 30, 1980.

The defendants-appellants appeal from Judge McCurn's order denying their motion to dismiss and granting the plaintiffs-appellees' motion for summary judgment. The appellees have moved before this court to dismiss the appeal for want of appellate jurisdiction. Arguing that this case "arises under" the EPAA, the appellees' position is that exclusive jurisdiction over all issues in this case is vested in the Temporary Emergency Court of Appeals (TECA) by virtue of Section 5 of the EPAA, 15 U.S.C. § 754(a)(1), which incorporates the review provisions of Section 211(b)(2) of the Economic Stabilization Act. 12 U.S.C.A. § 1904, note (West Supp.1980). Thus, this case and its companion case also decided today, *Mobil Oil Corp. v. Dubno*, 639 F.2d 919 (2d Cir. 1981) require an analysis of the appropriate allocation of appellate jurisdiction between a court of appeals and the TECA.

I

The Motion to Dismiss

(a) *Preemption*

[1] The threshold issue on this appeal is whether this court has jurisdiction to hear it. The appellee oil companies have argued that Section 211(b)(2) of the ESA, 12 U.S.C.A. § 1904, note (West Supp.1980), provides that the Temporary Emergency Court of Appeals (TECA) has "exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under [ESA]." Section 5 of the EPAA, 15 U.S.C. § 754(a)(1), incorporates by reference the jurisdictional provisions of § 211 of the ESA where there is judicial review of the regulations promulgated under Section 753(a) of the EPAA (mandatory allocation of crude oil, residual fuel oil and refined petroleum products) as well as any order or action taken by the President or his delegate under the chapter.

In *Coastal States Marketing, Inc. v. New England Petroleum Corp.*, 604 F.2d 179 (2d Cir. 1979) we held that a case or controversy arises under the ESA or EPAA where the district court has adjudicated an "ESA issue." (The court used that expression to mean issues involving the ESA and the EPAA as well as regulations promulgated under both statutes. *Id.* at 182 n.3). The Tenth Circuit has indicated that an ESA issue is one "involving the construction, applicability and effect" of the EPAA, *Mountain Fuel Supply Co. v. Johnson*, 586 F.2d 1375, 1382 (10th Cir. 1978), cert. denied, 441 U.S. 952, 99 S.Ct. 2182, 60 L.Ed.2d 1058 (1979).

The preemption issue presented here does present an EPAA question which was adjudicated in the District Court and is thus within TECA's exclusive appellate jurisdic-

tion. A major contention of the oil companies was that Section 182(12)(a) of the New York Tax Law prohibiting the passthrough of the two percent gross receipts tax was unconstitutional as a state price control rule which conflicted with the EPAA and the provision thus void under the Supremacy Clause of the United States Constitution (U.S.Const. art. VI, cl. 2). To make the determination that the state law conflicted with the federal regulations, as Judge McCurn found, necessitates "a careful examination of the Federal EPAA and the Mandatory Price Regulations promulgated thereunder." *Mobil Oil Corp. v. Tully*, supra, at 892. The trial judge proceeded therefore to analyze in detail the federal statute and regulations to determine whether or not the state law was in conflict with the regulations as well as the congressional scheme and policy. *Id.* at 898–910. Whether that analysis was correct is not properly before this court since in making the analysis the District Court was clearly construing and interpreting the EPAA and its regulations.

The appellants argue that the preemption claims arise under the Constitution rather than the EPAA and thus do not pose an EPAA question. The argument is not persuasive. In *Swift & Co. v. Wickham*, 382 U.S. 111, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965), the Supreme Court held that the issue of preemption did not involve a substantial constitutional question so as to warrant the convening of a three judge court pursuant to 28 U.S.C. § 2282. The Court declared that the basic question involved in a preemption case "is never one of interpretation of the Federal Constitution but inevitably one of comparing two statutes." *Id.* at 120, 86 S.Ct. at 263. See also *American Federation of Labor v. Watson*, 327 U.S. 582, 66

S.Ct. 761, 90 L.Ed. 873 (1946).

This court has made a similar analysis in *Andrews v. Maher*, 525 F.2d 113, 119 (2d Cir. 1975).

> "While [the Supremacy Clause] is the reason why a state law that conflicts with a federal statute is invalid, it is the federal statute that confers whatever rights the individual is seeking to vindicate."

It is obvious that in this case the trial court was obligated to and did make an analysis and interpretation of the two statutory schemes involved here, both state and federal. Having found that an impermissible conflict existed between the anti-pass-through provision and the federal statute, regulations and congressional policy, the finding of preemption was automatic. Appellants further argue that if arguendo the District Court did have exclusive jurisdiction in all suits arising under the EPAA, then it should not have adjudicated that issue but rather it should have followed the statutory mandate of Section 211(c) and made a determination as to whether a substantial constitutional question exists and if so "certify such issue to [TECA]." While our analysis would indicate that the substantial issue was statutory and regulatory analysis and interpretation rather than constitutional, the short answer to the contention is that the certification issue is a determination to be made by TECA and not this court. *Citronelle-Mobile Gathering, Inc. v. Gulf Oil Corp.*, 591 F.2d 711, 716 (Em.App.), cert. denied, 444 U.S. 879, 100 S.Ct. 168, 62 L.Ed.2d 109 (1979).

Appellants' further argument that an EPAA question is one limited to cases and controversies involving a regulation promulgated under Section 753(a) and not to all cases or controversies arising under the

EPAA itself is at odds with our statutory interpretation in *Coastal States Marketing v. New England Petroleum Corp., supra.* Here the District Court did analyze and apply the statute, the regulations and the underlying congressional policy. The District Court further made an adjudication resting on its interpretation of that federal scheme. It therefore decided an EPAA issue sufficient to vest TECA by statutory mandate with exclusive jurisdiction of this appeal on the preemption issue.

(b) *The Anti-Injunction Act*

[2] The oil company appellees' motion to dismiss the appeals on jurisdictional grounds is also addressed to the second issue on this appeal—that 28 U.S.C. § 1341, the Tax Injunction Act, deprived the District Court of jurisdiction. The appellants argue that the determination of the District Court that 28 U.S.C. § 1341 did not deprive it of jurisdiction was erroneous. The appellees contend, however, that the issue was ancillary to the EPAA question and therefore within TECA's exclusive appellate jurisdiction. We disagree with both arguments.

Section 1341 precludes the district courts from enjoining, suspending or restraining "the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." It is apparent that the inquiry of the District Court on this issue did not require any analysis of the EPAA or its regulations. It required solely an interpretation of a state statute to determine whether or not an injunction, suspension or restraint was proscribed by the federal statute. Appellees seemingly recognize

this but denominate it as an issue ancillary to the EPAA preemption question and therefore within TECA's exclusive jurisdiction.

In a comparable setting TECA has declined to take jurisdiction. In *Texaco, Inc. v. Department of Energy*, 616 F.2d 1193 (Em.App. 1979) TECA declined to accept jurisdiction to review a District Court holding that the Federal Energy Regulatory Commission had review authority under the Department of Energy Organization Act even though the DOE actions which were to be reviewed by the FERC were taken under the EPAA. The court reasoned that since the District Court's only decision was that the FERC had review authority, which was under the DOE Act and not the EPAA, it could not exercise jurisdiction since it involved the interpretation of a statute not within the review provisions of 15 U.S.C. § 754(a). The court stated, "... TECA has repeatedly refused to exercise jurisdiction over issues or claims not arising under the EPAA even though they may be joined in the same case with other issues or claims that do arise under the EPAA." *Id.* at 1196.

Here the federal statutory prohibition is plainly not within the EPAA and the refusal of TECA to exercise such jurisdiction is reasonably to be anticipated. Obviously, the TECA position can result in bifurcated appeals as it will in this case but that has been anticipated by this court in *Coastal States Marketing v. New England Petroleum Corp., supra*, 604 F.2d at 185. It is desirable to defer to a specialized federal appellate court, TECA, with its special expertise on EPAA issues, which in this appeal, includes the preemption question in-

volving analysis of the congressional intent in enacting the EPAA and the interpretation of the regulations adopted pursuant thereto.

[3] The oil companies rely upon several TECA holdings where TECA did take jurisdiction over ancillary non-EPAA issues so that it could "perform . . . the normal and necessary functions of any court." *Quincy Oil Inc. v. Federal Energy Administration*, 620 F.2d 890, 893 (Em.App.1980). However, TECA has exclusive jurisdiction only over EPAA issues. *Coastal States, supra*, 604 F.2d at 181. This Court as a court of appeals has concurrent jurisdiction in an appeal from a final order of a District Court over independent issues which do not present an EPAA question. *Id.* at 186. The Section 1341 question is substantial and is independently appealable to this court. The oil company's reliance on *M. Spiegel & Sons Oil Corp. v. B. P. Oil Corp.*, 531 F.2d 669 (2d Cir. 1976) is misplaced. That case did involve an appeal from an EPAA question which was within the exclusive jurisdiction of TECA as well as an ancillary issue—an appeal from an interlocutory order of the District Court refusing to transfer the action to another District Court. Our dismissal was based on the proposition that a ruling on a transfer motion is not independently appealable under 28 U.S.C. § 1292(a)(1). In this case the Section 1341 issue is independent and severable from the EPAA question and presents us with an appealable order from a final order of the District Court.

We conclude therefore that the motion to dismiss the appeal on jurisdictional grounds is granted with respect to the preemption question and denied as to the Section 1341 issue.

II

[4] Having determined that the preemption issue is within the exclusive jurisdiction of TECA and that the applicability of the Tax Injunction Act is properly before this court, we address the latter issue. Section 1341 is brief and facially clear:

> The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.

The position of the State defendants is essentially that the order of the District Court has effectively restricted the "assessment, levy or collection" of a New York State Tax and is thus within the clear proscription of Section 1341. The oil companies argue that they do not at all challenge the validity of the tax but simply the anti-passthrough provisions which they denominate as an exercise not of the taxing power of the State but rather its police power. The anti-passthrough provision, they urge, is a price fixing statute and not a taxing device. While the statutory linkage between the validity of this provision and the continued existence of the tax does result in the frustration of the State's power to collect the tax, this was the calculated decision of the legislature and not the result of the court's determination. While the briefing and argument on this issue has been intensive, there is no authority precisely in point.

The State appellants argue that Section 182(12)(a) is a state tax law and that the State has the authority to select the target of the tax. They rely upon language in *First Agricultural National Bank v. Tax Commission*, 392 U.S. 339, 347–48, 88 S.Ct.

2173, 2177–78, 20 L.Ed.2d 1138 (1968) where the Court held invalid a Massachusetts statute which imposed a sales tax upon a national bank. In the course of its opinion the Court construed the state statute as imposing the legal incidence of the tax upon the purchaser rather than the vendor. The Massachusetts State Court from which the appeal originated had construed the statute to impose the tax on the vendor. In reversing, the court stated "[t]here can be no doubt from the clear wording of the statute that the Massachusetts Legislature intended that this sales tax be passed on to the purchaser. For our purposes, at least, that intent is controlling." *Id.* at 348, 88 S.Ct. at 2178. It is difficult to understand how the State can reasonably construe this language to be helpful here. There was no Section 1341 issue in that case at all—the appeal was not from a district court but a state court. No one questions the right of the State of New York to place the legal incidence of the tax upon the oil companies—but it is an entirely different matter for the legislature to instruct the person taxed that he cannot raise the resources to pay the tax by increasing the price of his product.

As we have indicated the tax purpose of the legislation was to raise funds for the mass transit system. However, the purpose of the anti-passthrough provision was not to raise taxes but "to do nothing that will contribute to further increases in the price of petroleum products to (New York) consumers" and "to prevent such gross receipts tax from fueling inflation by prohibiting the passthrough of such tax to the consumers of this state." N.Y. Act, ch. 272, § 1.

This objective is certainly not an exercise of a taxing power but a police power affect-

ing the price structure of petroleum products. We agree that the State has the right to place the legal incidence of the tax upon the oil companies; it has selected its target. But in barring the targets of the tax from recovering their costs from the consumer directly or indirectly, the State has gone beyond its taxing powers and has employed its police powers. Whether this is appropriate is not the issue before us; whether it results in a collision with EPAA is for TECA. We simply hold that that action is not insulated from federal scrutiny by Section 1341.

The mere fact that the anti-passthrough section is contained in a tax law of the State should not lead to automatic sanctuary under Section 1341. In *Wells v. Malloy*, 510 F.2d 74 (2d Cir. 1975), this court held that a District Court was not prevented from considering the constitutionality of a Vermont Motor Vehicle Tax which provided for the suspension of a motor vehicle license if the owner failed to pay the tax due under the state law. An indigent claimed that such suspension created irreparable and immediate hardship and harm to him in violation of his equal protection rights under the fourteenth amendment. This court found that his attack did not seek a restraint upon the assessment, levy or even the collection of the tax.

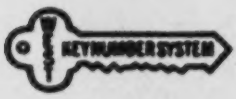
That the attack of the oil companies is not on those sections of Section 182 which provide for the assessment, levy or collection of the tax within the prohibition of Section 1341, is bolstered by the statement of James H. Tully, Jr., Commissioner of Taxation and Finance of the State of New York in his affidavit in support of a stay which states in part that the plaintiffs "do

not challenge the imposition of the tax, or the rate of the tax, or the allocation formula on the collection of the tax." He further stated that anti-passthrough provision "is all that the court enjoined."

We agree therefore with the District Court that the anti-passthrough provision is not an exercise of the taxing power of the State within Section 1341 but rather of its police powers directed to its express concerns about inflation and rising fuel costs. A constitutional attack under the Supremacy Clause on that aspect of the law is not within Section 1341.

Having so held we need not address the issue of whether or not a plain, speedy and efficient remedy may be had in the courts of this State.

The stay of enforcement is continued by this court and shall continue only until such time as the State can seek a stay from TECA. Any motion for further relief should be directed to that court.



APPENDIX C

Statutes Involved

28 USC § 1341 (the Tax Injunction Act) provides:

> "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State."

Subdivision 1 of New York Tax Law, § 182, provides:

> "1. Notwithstanding any other provision of this chapter, or of any other law, an annual tax is hereby imposed upon every oil company equal to two per centum of its gross receipts from all sources, or the portion thereof allocated within the state as hereinafter provided, for the privilege of exercising its corporate franchise, or of doing business, or of employing capital, or of owning or leasing property in this state in a corporate or organized capacity, or of maintaining an office in this state, for all or any part of each of its taxable years. In no event shall the tax imposed by this section be less than two hundred fifty dollars."

Subdivision 12(a) of New York Tax Law, § 182, provides (in pertinent part):

> "12. (a) The tax imposed by this section and any penalty which may be assessed under this subdivision shall be a liability of the oil company, shall be paid by such company and shall not be included, directly or indirectly, in the sales price of its products sold in this state.***"

Section 12(a) of chapter 272 of the New York Laws of 1980, provides:

> "§ 12. (a) If the provisions of paragraph (a) of subdivision twelve of section one hundred eighty-two of the tax law, as added by section four of this act, prohibiting the inclusion of the tax imposed by this act, directly or indirectly, in the sales price of its products sold in this state by the oil company upon which such tax has been imposed is: (i) adjudged by any court of competent jurisdiction to be invalid and after exhaustion of all further judicial review; or (ii) held in a formal opinion or ruling issued by the federal Economic Regulatory Administration or any other

federal agency of competent jurisdiction to be violative of the provisions of the federal Emergency Price Allocation Act of 1973, as amended, or the federal Mandatory Petroleum Price Regulations (10 CFR 212) promulgated pursuant thereto, or any successor federal law or regulation, and thereby rendered inoperative, and after exhaustion of all appeals therefrom, then, in either of such events, all of the provisions of this act cease to be in force and effect on the date provided for in subdivision (d) of this section."

Section 12(d) of chapter 272 of the New York Laws of 1980, provides (in pertinent part):

"(d) In the event that the provisions of this act shall cease to be in force and effect pursuant to the provisions of *** subdivision (a) *** of this section, the effective date of such cessaton shall be the tenth day after the effective date of *** the order or judgment, or formal opinion or ruling holding said paragraph (a) of subdivision twelve of section one hundred eighty-two of the tax law invalid, *** provided, however, that such tax shall continue in full force and effect until such day and all filing of returns and payment of taxes, interest and penalties otherwise required by this act for all periods prior to the cessation of such act shall be timely made and may be enforced as fully and to the same extent as if such act had continued in effect."